No. 13-461

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

REPLY BRIEF FOR PETITIONERS

Paul M. Smith*
Matthew E. Price
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6060
psmith@jenner.com

Paul D. Clement†
Counsel of Record
Erin E. Murphy
BANCROFT PLLC
1919 M Street NW Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Additional Counsel Information on Inside Cover

Richard L. Stone*
Amy M. Gallegos
JENNER & BLOCK LLP
633 West 5th Street
Los Angeles, CA 90071
(213) 239-5100

Bruce P. Keller†
Jeffrey P. Cunard
DEBEVOISE & PLIMPTON LLP
919 Third Avenue, 31st Floor
New York, NY 10022
(212) 909-6000

* *Counsel for Petitioners 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.*

† *Counsel for Petitioners 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; and WNJU–TV Broadcasting LLC.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF

Aereo's response brief gets a great deal wrong, but it gets one important thing right: This exceptionally important case warrants this Court's immediate review. The decision below approves a business model designed to achieve the for-profit exploitation of the copyrighted works of others on a massive scale. Aereo offers consumers the opportunity to "watch TV live," as its tagline proclaims, for less than its cable and satellite competitors precisely because, unlike those competitors, Aereo pays nothing for the content it offers. Common sense dictates that Congress could not plausibly have intended that result, and the plain text and statutory history of the Copyright Act's Transmit Clause readily confirm that it did not. Although courts outside the Second Circuit have had little trouble recognizing as much, the Second Circuit's contrary conclusion threatens to have a distorting—and quite likely irreversible—effect on the broadcast television industry unless this Court intervenes expeditiously. The Court should grant certiorari and reject the lower court's nonsensical conclusion that the Transmit Clause—which was explicitly enacted to prevent third parties from transmitting broadcast television via "any device or process" to paying strangers without authorization from copyright holders—somehow fails to reach a service unabashedly designed to do just that.

I. The Decision Below Is Deeply Flawed.

As explained at length in the petition, and underscored in numerous briefs of concerned *amici*, the decision below is wrong, is in conflict with the law else-

where, and clearly merits this Court's review now. Aereo concedes the last two points, but strains mightily to suggest that the decision below—or at least its result—is correct on the merits. There will be time enough to respond fully to Aereo's deeply flawed merits contentions if this Court grants plenary review, but a few of Aereo's more dubious propositions should be corrected immediately.

Aereo's response brief expends relatively little effort defending the reasoning of the decision below—and understandably so. As courts and commentators alike have explained, the Second Circuit's convoluted reading of the Transmit Clause cannot be reconciled with the plain text of the statute or Congress' manifest intent. *See, e.g.*, Pet. 24-26, *Fox Television Stations, Inc. v. FilmOn X LLC*, No. CV 13-758, __ F. Supp. 2d __, 2013 WL 4763414, at *12-*14 (D.D.C. Sept. 5, 2013); *Fox Television Stations, Inc. v. BarryDriller Content Sys. PLC*, 915 F. Supp. 2d 1138, 1144-46 (C.D. Cal. 2012); 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; 2 Paul Goldstein, *Goldstein on Copyright* §7.7.2, at 7:168 (3d ed. Supp. 2013-1); Jeffrey Malkan, *The Public Performance Problem in* Cartoon Network LP v. CSC Holdings, Inc., 89 Or. L. Rev. 505, 532 (2010).

Rather than defend the Second Circuit's reasoning, Aereo devotes substantial effort to attempting to recast itself as something it plainly is not—a mere supplier of equipment that individuals may use to enhance their "private reception of broadcast television." Resp. Br. 16. Make no mistake about it. Aereo is not a hardware supplier. It offers a subscription service. That sub-

scription service allows users to "[w]atch live TV online"—and to do so without paying for a subscription to any of the cable or satellite services that, unlike Aereo, actually *compensate* broadcast networks for the rights to retransmit their copyrighted content. *See* https://aereo.com ("Watch live TV online. Save shows for later. No cable required.") (last visited Dec. 20, 2013). Accordingly, this Court should reject Aereo's effort to rewrite the question presented in a manner that portrays Aereo as an equipment supplier. Aereo cannot deny that it has thousands of paid subscribers, all of whom can use Aereo to "watch live TV"—indeed, all of whom can watch the Super Bowl simultaneously. Petitioners' question presented properly asks whether this is what Congress intended to allow when it overruled *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), by enacting the Transmit Clause.[*]

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[*] Aereo claims that it does not make any transmissions itself, and that its users "exercise volitional control" over Aereo's system, Resp. Br. 23; *id.* at 17-18, because the subscribers push buttons on Aereo's website causing particular programs to be transmitted. But any retransmission service will allow users to control which programs they watch. That does not change the fact that the service is a retransmitter. As the District Court found, "*Aereo's system* creates a unique copy of each television program," Pet. App. 83a (quoted in Resp. Br. 8) (emphasis added), and "each transmission that *Aereo's system ultimately makes* to a subscriber is from that unique copy." *Id.* (quoted in Resp. Br. 8) (emphasis added); *see also id.* at 30a-31a (Second Circuit describing the "potential audience of each of *Aereo's transmissions*" (quoted in Resp. Br. 10) (emphasis added)).

Aereo also spends considerable time talking about DVRs and cloud computing, rather than its own business model. That impulse to change the subject is understandable. But ultimately it is Aereo's business model—and not distinct technologies that allow individuals to access content they have already paid for—that is at issue here. Thus, contrary to Aereo's intimations, *see, e.g.*, Resp. Br. 22 n.10, Aereo and those technologies do not stand or fall together. Aereo's business model depends distinctly on offering access to the copyrighted content of others without authorization, undercutting competing services that pay licensing fees to offer access to that content. Aereo does exactly what Congress prohibited in the Transmit Clause. "[T]his wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Congress enacted the Transmit Clause for the express purpose of *rejecting* the notion that retransmission services designed to enhance the public's "private reception of broadcast television" are somehow outside the scope of the public performance right. Resp. Br. 16. If Aereo's contrary arguments sound familiar, that is because they are nearly identical to the arguments this Court adopted in *Fortnightly*—only to have its analysis explicitly rejected by Congress in the 1976 amendments to the Copyright Act. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984) ("Prior to the 1976 revision, the [Supreme] Court had determined that the retransmission of distant broadcast signals by cable systems did not subject cable operators to copyright infringement liability because such retransmissions were not 'performances' within the meaning of the 1909 Act. In revising the Copyright Act, however, Congress con-

cluded that cable operators should be required to pay royalties to owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement." (internal citations omitted)).

For example, Aereo insists that its for-profit retransmission service does not infringe on petitioners' public performance rights because it merely "simplifies public access to free broadcast television," and because "a consumer can deploy such equipment at home without infringing copyright." Resp. Br. 1, 3; *see also, e.g.*, *id.* at 18 (contending that Aereo's subscribers, not Aereo, are responsible for any infringement because Aereo just "makes equipment located on Aereo's premises available for customers' use"). These arguments track nearly verbatim the arguments *Fortnightly* invoked to conclude that cable companies do not infringe on public performance rights. *See, e.g.*, *Fortnightly*, 392 U.S. at 399 ("the basic function [cable] equipment serves is little different from that served by the equipment generally furnished by a television viewer"); *id.* (contending that a cable company "no more than enhances the viewer's capacity to receive the broadcaster's signals" by "provid[ing] a well-located antenna"); *id.* at 400 (deeming "[t]he only difference" between a cable company and "an individual [who] erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment" to be that "the [cable company's] antenna system is erected and owned not by its users but by an entrepreneur"). Those striking similarities underscore the utter incompatibility of Aereo's arguments with the Transmit Clause, the whole point of which was to reject the analysis that *Fortnightly* embraced.

Rather than come to grips with that reality, Aereo insists that *Fortnightly* was about cable companies, and that its own retransmission service "does not operate like a cable system." Resp. Br. 12. But Congress could not have made clearer that it drafted the Transmit Clause to bring *all* public retransmission services—not just cable companies—within the scope of the public performance right. Indeed, the statute is replete with broad definitions eschewing any focus on the technological details of how retransmission to the public is achieved. For instance, Congress defined "to transmit" as "to communicate … *by any device or process* whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. §101 (emphasis added). It defined "device" or "process" to include "one now known *or later developed*." *Id.* (emphasis added). And the Transmit Clause itself defines "[t]o perform … 'publicly'" not only as "to transmit," but also as to "*otherwise communicate* a performance or display of the work … to the public." *Id.* (emphasis added).

In short, Congress considered and rejected the notion that retransmission services designed to achieve "advances in private reception of broadcast television," Resp. Br. 16, are somehow immune from liability for infringing a copyright holder's exclusive public performance right. Congress likewise considered and rejected the notion that retransmission services may invoke technological details to circumvent the Transmit Clause. Under any faithful reading of the statute, Aereo's business of transmitting copyrighted performances to the public without authorization from or compensation to copyright holders plainly infringes upon their exclusive public performance rights. No

amount of miniature antennas or subscriber-associated copies can change that reality.

II. As All Agree, The Decision Below Merits This Court's Immediate Review.

As explained in the petition, the Second Circuit's contrary conclusion poses a serious and imminent threat to the broadcast television industry. *See* Pet. Part II; *Amicus* Br. of Nat'l Ass'n of Broadcasters 20-25; *Amicus* Br. of ASCAP 9-12. Aereo may have been the first company to attempt so brazenly to exploit the loophole in copyright protection that the Second Circuit has created, but absent this Court's intervention, it certainly will not be the last. Indeed, Aereo already has spawned one copycat service. And it has continued with its own expansion plans, even as courts outside the Second Circuit have rejected that court's atextual reading of the Transmit Clause and enjoined the copycat service's operations. *See FilmOn X LLC*, 2013 WL 4763414, at *12-14; *BarryDriller*, 915 F. Supp. 2d at 1144-46; Pet. 34; Resp. Br. 19. Even more troubling, nothing in the decision below prevents legitimate retransmission services from redesigning their own technology to achieve the same kind of work-around that the Second Circuit sanctioned here. *See* Pet. 34. If Aereo's "Rube-Goldberg-like contrivance" excuses it from paying licensing fees, cable and satellite will have little reason to continue to pay for what their nascent competitor simply takes.

Moreover, contrary to Aereo's contentions, the Second Circuit's novel interpretation of the Transmit Clause actually undermines the very technological innovation Aereo purports to champion. Internet-based

content delivery services such as Hulu, Netflix, and Amazon have had little trouble developing efficient and affordable technology that responds to the needs of the modern-day consumer, while still obtaining authorization from and providing compensation to broadcasters for the right to distribute their copyrighted content over the Internet. *See Amicus* Br. of Time Warner 10; *Amicus* Br. of Nat'l Football League 8. The decision below skews the development of that market by incentivizing retransmission services to pursue evasion of copyright law, even at the expense of technological efficiency. *See* Pet. App. 40a ("there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna"); Amicus Br. of Copyright Alliance 13-15.

Developments after this Court's decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), provide a useful parallel. In the wake of that decision, consumers now have easy and legitimate access to content through a variety of different business models and formats. Experience thus teaches that there is no real tension between respecting copyright and fostering widespread and inexpensive access to content. *See, e.g.*, Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. Times, Feb. 27, 2013, at B3. But experience also teaches that it is difficult to "compete with free," and business models founded on exploiting the copyrighted works of others without compensation provide a direct threat to the values embodied in the Copyright Act and the Copyright Clause of the Constitution.

In short, the need for this Court's intervention is great, and the time for this Court's intervention is now.

Industry participants cannot and will not wait much longer before responding to the distortions that the law of the nation's largest market is creating. Indeed, many have already begun to do so. *See* Pet. 34-35. Thus, as the parties now agree, this Court's intervention is imperative. The Court should grant the petition and close the gaping loophole in copyright law that the Second Circuit has created.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul M. Smith*
Matthew E. Price
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6060
psmith@jenner.com

Paul D. Clement†
Counsel of Record
Erin E. Murphy
BANCROFT PLLC
1919 M Street NW Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Richard L. Stone*
Amy M. Gallegos
JENNER & BLOCK LLP
633 West 5th Street
Los Angeles, CA 90071
(213) 239-5100

Bruce P. Keller†
Jeffrey P. Cunard
DEBEVOISE & PLIMPTON LLP
919 Third Avenue, 31st Floor
New York, NY 10022
(212) 909-6000

* *Counsel for Petitioners 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.*

† *Counsel for Petitioners 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; and WNJU–TV Broadcasting LLC.*