

No. 13-461

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

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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.*

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

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**BRIEF FOR PETITIONERS**

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PAUL M. SMITH\*  
MATTHEW E. PRICE  
JENNER & BLOCK LLP  
1099 New York Ave. NW,  
Ste. 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, Ste. 470  
Washington, DC 20036  
(202) 234-0090  
pclement@bancroftpllc.com

*Additional Counsel Information on Inside Cover*

February 24, 2014

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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.*

## 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 on which this Court granted certiorari 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. (formerly known as Bamboom Labs, Inc.).

## **CORPORATE DISCLOSURE STATEMENT**

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, a publicly held corporation. No other publicly held corporation owns 10% 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, a publicly held corporation. No other publicly held corporation owns 10% 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, a publicly held corporation. No

other publicly held corporation owns 10% 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, a publicly held corporation. No other publicly held corporation owns 10% 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, a publicly held corporation. No other publicly held corporation owns 10% 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, has no parent corporation, and there is no publicly held corporation that owns more than 10% 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 more than 10% of its stock.

Fox Television Stations, Inc. is a subsidiary of Twenty-First Century Fox, Inc., a publicly traded company.

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.

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 these 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 these 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 more than 10% of its stock.

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## **OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 712 F.3d 676 and reprinted at Pet.App.1a–58a. The order of the Court of Appeals denying rehearing en banc and Judge Chin’s accompanying dissent are reported at 722 F.3d 500 and reprinted at Pet.App.127a–55a. The District Court’s opinion denying a preliminary injunction is reported at 874 F. Supp. 2d 373 and reprinted at Pet.App.59a–126a.

## **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 granted certiorari on January 10, 2014. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Copyright Clause of the U.S. Constitution, U.S. Const. art. 1, § 8, cl. 8, and the relevant portions of sections 101 and 106 of the Copyright Act of 1976, 17 U.S.C. §§ 101, 106, are reproduced in the appendix to this brief. App.1a–3a.

## **STATEMENT OF THE CASE**

### **A. Statutory Background**

The Constitution empowers Congress “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. 1, § 8, cl. 8. The basic “philosophy behind the clause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare

through the talents of authors and inventors.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003). Thus, while the ultimate goal of copyright protection is to “promot[e] broad public availability of literature, music, and the other arts,” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710 (1984), the law does so not by promoting public access at all costs, but rather by “rewarding the creators of copyrighted works,” *id.*, thereby providing an “incentive” designed “to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also, e.g., Eldred*, 537 U.S. at 212 n.18 (“copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge”).

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 generally cannot perform another’s work publicly without authorization from (and compensation to) the creator.

As technology has evolved over the years, so too has Congress’ understanding of what it means to perform a copyrighted work publicly—particularly when it comes to broadcast television programming.

Although broadcast television companies collectively invest billions of dollars in the creation, acquisition, and production of copyrighted content, they broadcast that content over the air to the public for free. Those over-the-air broadcasts long have been considered quintessential public performances, even though people typically watch television in the privacy of their homes. Broadcast television providers recoup their substantial investments in the copyrighted content they broadcast over the air for free through, among other things, advertising revenue and licensing others to exercise their exclusive rights to certain uses of that content. But precisely because broadcast television can be accessed by anyone with an antenna, it is particularly vulnerable to unauthorized exploitation by third parties looking to profit from its “retransmission”—*i.e.*, to capture free over-the-air broadcasts and retransmit them to the public for a fee, without seeking permission from or paying compensation to those responsible for creating the broadcasted works.

This Court considered one such unauthorized retransmission 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 over-the-air broadcasts using antennas placed on hilltops and retransmitting those signals via cable to viewers in areas unable to receive the broadcasts with antennas of their own. The question before the Court was one the 1909 Copyright Act did not specifically address—namely, whether retransmitting broadcasts of

copyrighted content infringes upon the copyright holder's exclusive public-performance right. Reasoning that the "CATV system no more than enhance[d] the viewer's capacity to receive the broadcaster's signals," the Court concluded that it did not perform the copyrighted works at all. *Id.* at 399.

The Court approached the question by observing that "if 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. Because the Court deemed immaterial "[t]he only difference in the case of CATV"—namely, "that the antenna system [wa]s erected and owned not by its users but by an entrepreneur"—it concluded that the CATV system was not performing either. *Id.* A few years later, the Court invoked the same logic to hold that there is no performance (public or otherwise) when a cable company retransmits local broadcasts to paying subscribers in distant areas. *See Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974). Again, the Court reasoned that "[t]he privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so." *Id.* at 408.

Congress emphatically rejected that approach in the 1976 Copyright Act. Seeking to overturn *Fortnightly* and *Teleprompter*, Congress enacted a series of definitions designed not only to ensure that the public-performance right includes retransmitting broadcast television signals to the public, but also to



reach all those who would build a business model out of transmitting performances of the copyrighted works of others 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 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.* 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.*

Two aspects of the second paragraph of the definition of “publicly” (the “transmit clause”) are

particularly noteworthy. First, although Congress recognized that people typically watch retransmitted television programming in the privacy of their own homes, it unquestionably intended “the public” to include subscribers to a broadcast retransmission service. To that end, Congress provided that one is transmitting a performance “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.* Congress also contrasted the term “public” with clause (1)’s phrase “a normal circle of a family and its social acquaintances,” *id.*, thus rendering a broader audience “the public.”

Second, although cable companies may have prompted Congress to enact the transmit clause, the clause is by no means directed solely at cable retransmission services; to the contrary, it is purposefully broad and technology-neutral. Congress drafted the statute to include transmitting a performance to the public “by means of *any* device or process,” and defined “device” and “process” to include “one now known *or later developed.*” *Id.* (emphasis added). Plainly, Congress did not want liability to turn on the technical details of a transmission service; nor did it want the transmit clause 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. The legislative history likewise confirms that “[t]he definition of ‘transmit’ ... is broad enough to include all conceivable forms and combinations of wired or

wireless communications media, including but by no means limited to radio and television broadcasting as we know them.” H.R. Rep. No. 94-1476, at 64 (1976). In short, “the concept[] of public performance ... cover[s] not only the initial rendition or showing, but also *any* further act by which that rendition or showing is transmitted or communicated to the public.” *Id.* at 63 (emphasis added).

### **B. Aereo: “Watch Live TV Online”**

1. Aereo is a commercial 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 an on-screen guide a program currently being broadcast on local television, and 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.”<sup>1</sup> Aereo can offer access to “live TV” at a cheaper price than its competitors in large part because, unlike licensed cable and satellite services or licensed Internet video on demand services, Aereo has not obtained any kind of permission or paid anyone for the rights to retransmit this copyrighted content. Instead, like the CATV system in *Fortnightly*, Aereo simply captures over-the-air broadcasts and then, without authorization, profits

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<sup>1</sup> See <https://aereo.com>.

from retransmitting those broadcasts to its subscribers.

This would seem to be obvious copyright infringement—an entire business model premised on massive and unauthorized commercial exploitation of copyrighted works, where the prices of competitors are undercut because they are licensed and pay fees. And it also would seem to be precisely the kind of retransmission service that Congress enacted the transmit clause to reach. Yet Aereo claims to escape that commonsense conclusion because of the technical details of its retransmission system—*i.e.*, the particular devices and processes it employs. In Aereo’s view, when it retransmits live television to thousands of paying strangers, it is engaged in thousands of simultaneous *private* performances, and therefore is not infringing upon anyone’s public-performance rights.

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*”), which adopted a novel reading of the transmit clause that has since been rejected by other courts and widely criticized by commentators.<sup>2</sup> *Cablevision* involved a challenge to a

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<sup>2</sup> See, e.g., *Community Television of Utah, LLC dba KMYU v. Aereo*, No. 13-910, Memo. Decision & Order (D. Utah Feb. 19, 2014) (rejecting *Cablevision*’s interpretation of the transmit clause and enjoining Aereo from operating in the Tenth Circuit); *Fox Television Stations, Inc. v. FilmOn X LLC*, \_\_ F. Supp. 2d \_\_, 2013 WL 4763414 (D.D.C. Sept. 5, 2013) (rejecting *Cablevision*’s interpretation of the transmit clause and enjoining service functionally identical to Aereo from operating

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 or set-top DVR, allowing subscribers of licensed cable companies to time-shift copyrighted shows that are on channels in their cable packages. But unlike a set-top DVR, an RS-DVR allows the subscriber to store programs recorded for later viewing on a subscriber-specific hard drive located at the cable company’s offices, instead of in the subscriber’s home. *See id.* at 123–24. In *Cablevision*, the cable company (in contrast to Aereo) already had a license to retransmit broadcast television 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 public-performance rights. Pet.App.41a.

The Second Circuit resolved that question by adopting a novel construction of the transmit clause—a construction upon which Aereo seized to

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everywhere except the Second Circuit); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012) (rejecting *Cablevision*’s interpretation of the transmit clause and enjoining service functionally identical to Aereo from operating in the Ninth Circuit); 2 Paul Goldstein, *Goldstein on Copyright* § 7.7.2, at 7:168 (3d ed. Supp. 2013-1); Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, MediaInstitute.org (April 23, 2013), <http://bit.ly/1nWUgQL>; Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 Or. L. Rev. 505, 532 (2010).

contend that its massive for-profit retransmission scheme somehow escapes the reach of the Copyright Act. Under the reasoning of *Cablevision*, rather than ask whether an alleged infringer is transmitting a performance of a copyrighted work to the public, a court instead asks whether each *distinct transmission* sent by the alleged infringer is capable of reaching more than one person. As the Second Circuit put it, “the transmit clause directs us to examine who precisely is ‘capable of receiving’ a *particular transmission of a performance*.” 536 F.3d at 135 (emphasis added). In other words, according to the Second Circuit, when Congress wrote “capable of receiving the *performance or display*,” 17 U.S.C. § 101 (emphasis added), it actually meant “capable of receiving the *transmission*.” In the court’s view, so long as no two people can receive *the same transmission* of the performance, the public-performance right is not violated—even if the alleged infringer is simultaneously transmitting the same performance to thousands of members of the public without authorization.

Applying that interpretation to the technology before it, the court concluded that the RS-DVR service was not engaged in public performance. 536 F.3d at 137. The Second Circuit did represent, however, that its opinion should not be read as creating a blueprint for other content delivery services to avoid liability for copyright infringement, *see id.* at 139—a representation that the Solicitor General seized upon in recommending against granting certiorari, *see Br. for United States as Amicus Curiae 6, Cable News Network, Inc. v. CSC*

*Holdings, Inc.*, 557 U.S. 946 (2009) (No. 08-448), 2009 WL 1511740, at \*6.

2. Aereo offers a retransmission service that it acknowledges “was designed around the *Cablevision* holding.” Pet.App.32a. That much is obvious. Aereo’s convoluted technological design serves no other purpose; it does not make transmission faster, more efficient, or cheaper—except insofar as Aereo believes that it obviates the need to pay copyright holders the compensation legally demanded of its competitors. Indeed, Aereo initially confined its operations to New York precisely because the Second Circuit alone had adopted the novel construction of the transmit clause around which Aereo’s system was designed. In short, Aereo crafted its system to accomplish exactly what Congress enacted the transmit clause to prevent: to avoid liability for transmitting performances of copyrighted works to the public by invoking the purported novelty of its “device or process” for doing so. 17 U.S.C. § 101.

Specifically, Aereo captures over-the-air broadcasts 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.6a–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–8a. 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—in other words, to “Watch live TV online.” Pet.App.7a. Aereo’s dime-sized antennas generally are assigned not to a single subscriber, but rather “dynamically”; 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 designed for a single purpose: “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 originating from a separate copy, Aereo is not performing publicly when it simultaneously retransmits the same broadcast of the same program to thousands of subscribers.

### **C. Proceedings Below**

1. Petitioners own the copyrights to numerous programs broadcast by television stations over the air. Collectively, Petitioners have spent billions of dollars to produce or obtain these copyrighted works. 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 Southern District of New York. Petitioners alleged, *inter alia*, infringement of their rights of public performance and reproduction under 17 U.S.C. § 106. They immediately moved for a preliminary injunction on the public-performance claims, seeking to bar Aereo from retransmitting their copyrighted programming live 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 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,” 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 claims. Pet.App.59a–60a.

Nevertheless, recognizing that “this case turns on important legal questions,” Pet.App.107a, the 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,” 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. In a 2-1 decision, the court affirmed, extending *Cablevision* and holding that it compelled the conclusion that Aereo is not engaged in public performance. See Pet.App.2a. The majority began by acknowledging that it is “undisputed” that “Aereo transmits to its subscribers broadcast television programs over the internet for a monthly subscription fee.” Pet.App.2a–3a. But under *Cablevision*, the majority explained, it is Aereo’s “technical architecture” that “matters.” Pet.App.33a. Accordingly, the court deemed it more relevant that “[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. Based on these “two features,” the majority concluded that there is no public performance because “just as in *Cablevision*, the potential audience of each Aereo transmission is the

single user who requested that a program be recorded.” Pet.App.23a.

Petitioners explained, among other things, that the transmit clause explicitly contemplates that a performance can be transmitted “to the public” through multiple transmissions, as two different people cannot receive the same transmission “at different times.” 17 U.S.C. § 101. Although the Second Circuit acknowledged that its “focus on the potential audience of each particular transmission would essentially read out the ‘different times’ language” from the transmit clause, it nonetheless deemed any other interpretation “foreclosed by *Cablevision*.” Pet.App.21a–22a n.11, 25a–26a.

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.<sup>3</sup>

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<sup>3</sup> Judge Chin explained how Aereo’s service differs from the remote storage DVR service at issue in *Cablevision*:

*Cablevision* involved a cable company that paid statutory licensing and retransmission consent fees for the content it retransmitted, while Aereo pays no such fees. Moreover, the subscribers in *Cablevision* already had the ability to view television programs in real-time through their *authorized* cable subscriptions, and the

3. Petitioners filed a timely petition for rehearing *en banc*. The Court of Appeals denied the petition, again over a dissent by Judge Chin, this time joined by Judge Wesley. Pet.App.128a–55a.

Judge Chin began his statutory analysis by explaining why the panel’s conclusion is inconsistent with the statutory language and Congress’ 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 (footnote omitted).

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remote digital video recording service at issue there was a supplemental service that allowed subscribers to store that authorized content for later viewing. In contrast, no part of Aereo’s system is authorized. Instead, its storage and time-shifting functions are an integral part of an unlicensed retransmission service that captures broadcast television programs and streams them over the Internet.

Pet.App.40a–41a.

Judge Chin criticized the panel for placing decisive weight on how Aereo engineered its system, rather than recognizing that its miniature antennas and unique copies are merely a “device or process” for communicating performances of 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. 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. A “commercial enterprise that sells subscriptions to paying strangers for a broadcast television retransmission service” retransmits broadcast television programs to the public. Pet.App.154a.

Judge Chin explained that the *Cablevision* court erred by “conflat[ing] 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. Judge Chin found “no indication Congress meant anything other than what it said: the public must be capable of receiving the *performance or display*, not the *transmission*.” Pet.App.144a. In Congress’ view, he concluded, “[a]ll 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.

Judge Chin also emphasized 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 he 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. By “permit[ting] Aereo to retransmit television broadcasts without paying a fee,” the panel’s decision “undermines this model,” as it incentivizes cable and satellite companies to “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, 132a–33a. In short, Judge Chin concluded, the panel’s decision to “elevate[] form over substance .... upends settled industry expectations and established law” and “should not be permitted to stand.” Pet.App.154a–55a.

### SUMMARY OF ARGUMENT

Aereo has built a business out of retransmitting broadcast television to members of the public without seeking authorization from or paying compensation to copyright holders. That is precisely the kind of unauthorized exploitation of copyrighted content that Congress enacted the transmit clause to prevent. Indeed, Aereo derives its competitive advantage in large part from the fact that its competitors *pay* for the rights to retransmit “live TV” to the public—as they must to avoid liability for copyright infringement—while Aereo does not. But nothing

about Aereo's convoluted scheme of miniature antennas and gratuitous copies exempts its commercial retransmission service from the same rules that govern all others. Aereo's unauthorized retransmission of broadcast television to the public is obvious and unambiguous copyright infringement. Both the transmit clause and common sense foreclose any other conclusion.

The transmit clause defines “[t]o perform or display a work ‘publicly’” as “to transmit or otherwise communicate a performance ... of the work ... to the public, by means of any device or process.” 17 U.S.C. § 101. That is exactly what Aereo does: It captures an over-the-air broadcast of a television program and retransmits that broadcast to anyone willing to pay a fee. Aereo thus transmits performances to thousands of paying strangers, who all “Watch live TV” programs at the same time, albeit in different places. That is a textbook public performance under the transmit clause. Congress could not have been clearer that it does not matter whether members of the public receive these unauthorized retransmissions “in the same place or in separate places,” or, for that matter, “at the same time or at different times.” *Id.* And the precise technical details of how Aereo provides this service—with one big antenna, thousands of little ones, or in some other manner—likewise are irrelevant. The transmit clause is expressly indifferent to technical details; it reaches transmission by “any device or process,” whether “known” in 1976 “or later developed.” *Id.* In short, what matters under the transmit clause is whether Aereo transmits a performance of a

copyrighted work to the public. There can be no serious dispute that it does.

Indeed, the Congress that enacted the transmit clause could not possibly have thought otherwise. The whole point of the provision was to reject emphatically *Fortnightly's* conclusion that a commercial retransmission system is not engaged in public performance. Congress was so resolute in its judgment that retransmitting broadcast television constitutes public performance that it went to great lengths to draft a technology-neutral statute that would reach not just the cable services at issue in *Fortnightly*, but “*all conceivable* forms and combinations of wired or wireless communications media” that might be used to retransmit broadcast television to the public, wherever and whenever the public might receive performances of that copyrighted content. H.R. Rep. No. 94-1476, at 64 (emphasis added). It is simply not plausible that a Congress so determined to guard against both existing technical workarounds and the risk that new technology might render the statute obsolete would have viewed the use of thousands of little antennas as making any difference.

The Second Circuit’s contrary conclusion is flawed at every turn. The court’s myopic focus on the potential recipients of distinct transmissions is contradicted by the text of the statute, which asks whether an alleged infringer is transmitting a *performance* to the public, not whether multiple people are capable of receiving *each transmission*. This case is evidence enough that any other reading of the transmit clause produces bizarre results: In



the Second Circuit's view, when Aereo simultaneously retransmits a live broadcast of the Super Bowl to thousands of subscribers, it is not retransmitting to the public. It is instead simultaneously performing "privately" to thousands of paying strangers. As courts and commentators alike have recognized, that conclusion is irreconcilable with the text, Congress' intent, and common sense.

Ultimately, the problems with Aereo's arguments run much deeper than their utter incompatibility with the transmit clause and the purpose it so plainly was enacted to serve. It is settled law that third parties must *pay* for the rights to transmit performances of copyrighted works to the public. The broadcast television industry has invested billions of dollars producing, assembling, and distributing entertainment and news programming in reliance on this legal regime. Yet Aereo has built an entire business around exploiting that copyrighted content—and has done so without obtaining permission from copyright owners or paying anyone a penny. And if Aereo prevails, nothing will stop other services that currently pay for the rights to retransmit broadcast television from devising their own Aereo-like workarounds to achieve the same result.

That would be troubling enough for broadcasters, who are ever more reliant on the ability to recoup their substantial investments through compensation from those who retransmit their content. But it also would fundamentally undermine copyright protection, by depriving copyright holders of their core right to decide if, when, and how to make their

works available to the public. For years, an entire market for the online distribution and transmission of copyrighted content has been developing in a manner that respects, rather than denies, the copyright holder's basic right to control that content. Aereo's efforts to circumvent that market and avoid paying for the same rights that others have paid for strikes at the very heart of copyright protection in the digital age. As *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), demonstrates, it is very hard for legitimate businesses that respect copyright law to "compete with free." Copyright law must remain structured to incentivize development of innovative content-distributing technologies that respect the copyright owner's most basic rights, not "Rube Goldberg-like contrivances" that attempt to exploit perceived gaps in that law.

At bottom, Aereo's arguments are irreconcilable not just with the transmit clause and Congress' manifest intent in enacting it, but also with the basic philosophy that copyright protection embodies. As this Court has had little trouble recognizing in recent years, the Copyright Act does not tolerate business models premised on the unauthorized exploitation of the copyrighted works of others. Aereo's massive, for-profit scheme for exploiting Petitioners' public-performance rights is no exception.

## ARGUMENT

### **I. Aereo's Unauthorized Retransmission Service Infringes Upon Petitioners' Public-Performance Rights.**

#### **A. The Plain Text of the Transmit Clause Clearly Reaches Aereo's Conduct.**

Aereo is in the business of retransmitting live television broadcasts to paying strangers. That conduct falls squarely within Congress' unambiguous definition of what it means "[t]o perform or display a work 'publicly'": Aereo "transmit[s] or otherwise communicate[s] a performance ... of the work ... to the public, by means of any device or process." 17 U.S.C. § 101. The facts that establish as much are not even contested. There is no dispute that Aereo captures over-the-air television broadcasts for retransmission to its paying subscribers. There is no dispute that the broadcasts Aereo captures for retransmission are performances of copyrighted works. There is no dispute that Aereo offers retransmission of these performances to the public. (Indeed, Aereo emphasizes that any member of the public who subscribes will be able to watch these retransmitted broadcasts "live.") And there is no dispute that Aereo does not have permission to do so from the holders of the copyrights in the works performed. It is difficult to conceive of a more clear-cut case of infringement of the public-performance right.

This case really is as simple as that. The plain text of the transmit clause forecloses any other conclusion. That Aereo retransmits broadcast television to individuals in the privacy of their homes is irrelevant, as Congress made perfectly clear that it

does not matter “whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places.” *Id.* That Aereo uses multiple transmissions to transmit the same performance to members of the public is immaterial as well, as Congress expressly contemplated the use of multiple transmissions when it provided that an alleged infringer is transmitting a performance to the public regardless of whether members of the public receive the performance “at the same time or at different times.” *Id.* Two members of the public who receive a performance “at different times” necessarily receive it by way of separate transmissions. And the technological details of the process by which Aereo retransmits broadcast television to its subscribers are beside the point, as Congress explicitly defined the public-performance right to encompass the use of “*any device or process*” to transmit or otherwise communicate a performance of a copyrighted work to the public. *Id.* (emphasis added).

Indeed, the text could not more clearly convey Congress’ manifest desire to define the public-performance right in broad and technology-neutral terms, to ensure that future technologies like Aereo’s would not escape its reach. Congress expansively defined “[t]o perform” a work as “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.” *Id.* (emphasis added). It expansively defined “[t]o perform ... a work ‘publicly’” as “to transmit *or otherwise communicate*” a performance of

the work to the public. *Id.* (emphasis added). It expansively defined “[t]o ‘transmit’ as ‘to communicate [a performance] *by any device or process.*” *Id.* (emphasis added). And it expansively defined “device” or “process” to include “one now known *or later developed.*” *Id.* (emphasis added). In short, at every turn, Congress made plain its intent to foreclose technical or technological evasion of the public-performance right.

In sum, there can be no serious dispute that the plain text of the statute renders the use of any device or process to transmit or otherwise communicate a performance of a copyrighted work to the public without the consent of the copyright holder an infringement upon the exclusive public-performance right. Nor can there be any serious dispute that Aereo’s system of dime-size antennas and gratuitous copies is just another device or process for doing exactly that. Aereo captures television broadcasts and retransmits them to members of the public without seeking authorization from or paying compensation to copyright holders. Nothing about the device or process through which Aereo achieves that impermissible end changes this straightforward textual analysis in any way.

**B. Aereo Provides Precisely the Kind of Service that Congress Enacted the Transmit Clause to Reach.**

Although the plain text of the statute squarely resolves this case, the history of the transmit clause readily reinforces the conclusion the text demands. The whole point of the transmit clause was to reject any suggestion that retransmission services fall

outside the public-performance right. It is inconceivable that Congress could have intended any reading of the statute that would fail to capture the very type of service that prompted its enactment.

Congress enacted the transmit clause to address a question virtually identical to the question in this case—namely, whether a third party may capture and retransmit over-the-air broadcast television programming to paying members of the public without obtaining authorization from or providing compensation to copyright holders. Although the advent of cable technology had led Congress to begin considering that question even before *Fortnightly* reached this Court, by the time Congress enacted the transmit clause, *Fortnightly* and *Teleprompter* had set the terms of the debate, and Congress legislated with the express objective of overturning their conclusion that retransmitting over-the-air television broadcasts was not public performance—indeed, was not performance at all.

As explained, *see supra* pp. 3–4, *Fortnightly* concerned whether a cable company infringed upon public-performance rights when it used strategically placed antennas and cables to capture over-the-air broadcasts and carry them to its subscribers. The basic question was whether the public availability of over-the-air broadcasts compelled a different analysis for public-performance purposes when a third party retransmitted those broadcasts without authorization from copyright holders. This Court answered that question by concluding that, under the 1909 Copyright Act, a cable company was not engaged in any kind of performance—public or

private—because it “no more than enhance[d] the viewer’s capacity to receive the broadcaster’s signals,” which the broadcaster already had agreed to make available to the public free of charge. 392 U.S. at 399. In effect, the Court treated the cable companies as mere suppliers of equipment that was “little different from ... the equipment generally furnished by a television viewer” to receive broadcasts already made available for free. *Id.*; see also *Teleprompter*, 415 U.S. at 408 (reasoning that “[t]he privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so”).

Congress emphatically rejected that approach in its 1976 revisions to the Copyright Act, which were designed to “completely overturn[]” *Fortnightly* and *Teleprompter*. H.R. Rep. No. 94-1476, at 86–87; see also *id.* at 88–89; *Crisp*, 467 U.S. at 709 (same). As the legislative history accompanying those revisions makes clear, in Congress’ view, there is a fundamental difference between an individual who uses an antenna to receive broadcast television programming for free and a “commercial enterprise[] whose basic retransmission operations are based on the carriage of copyrighted program material.” H.R. Rep. No. 94-1476, at 88–89. Because the latter involves an entire business model built around public exploitation of the copyrighted content of others, Congress concluded that “further transmission of a broadcast to the public” without authorization should be “considered an infringing act.” *Id.* at 86–87. In keeping with that conclusion, the legislative history expressly confirms that Congress’ broad definitions of

“perform,” “display,” “publicly,” and “transmit” were designed to ensure that “the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public.” *Id.* at 63.

While Congress certainly intended its revisions to confirm that “a cable television system is performing when it retransmits the broadcast to its subscribers,” *id.*, Congress did not stop with addressing the specific technology at issue in *Fortnightly* and *Teleprompter*. To the contrary, Congress went out of its way to craft a statute that would reach not just existing but also future technologies that might be used to transmit performances of copyrighted works to the public. Indeed, one of Congress’ primary goals was to ensure that its revisions were “broad enough to include *all conceivable* forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them.” *Id.* at 64 (emphasis added); *see also*, *e.g.*, *id.* at 63 (“A performance may be accomplished ‘either directly 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.”); S. Rep. No. 94-473, at 60 (1975) (same).<sup>4</sup>

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<sup>4</sup> By contrast, the statutory licensing scheme Congress established in the 1976 revisions to create a streamlined mechanism for cable companies to pay copyright holders for the rights to retransmit broadcast television is explicitly *technology-*



The legislative history of the 1976 revisions thus makes two things crystal clear. First, Congress considered *and rejected* the notion that retransmission services do not infringe upon copyright holders' public-performance rights simply because the initial broadcast is available to the public for free. In Congress' view, a retransmission service may not avoid liability by insisting that "the basic function [its] equipment serves is little different from that served by the equipment generally furnished by a television viewer." *Fortnightly*, 392 U.S. at 399. In short, Congress concluded that a retransmission service is offering access to *content*, not *equipment*, and that it must pay for the right to do so.

Second, Congress was at pains to ensure that the transmit clause would leave no room for technological workarounds. It carefully crafted the statute to reach "[e]ach and every method"—whether existing or not yet invented—"by which the images or sounds comprising a performance or display are picked up and conveyed" to the public. H.R. Rep. No. 94-1476, at

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*specific*: It applies *only* to "transmissions by cable systems." 17 U.S.C. § 111(c)–(d). Congress again legislated in technology-specific terms when it provided a similar licensing scheme *only* for satellite companies. *See id.* §§ 119 & 122. As these cable- and satellite-specific licensing schemes underscore, Congress knows how to legislate in technology-specific ways. Moreover, even when Congress has determined that ensuring availability of particular retransmission technologies is in the public interest, it has not narrowed the scope of the public-performance right to achieve that result, but rather generally has mandated that the providers of those services *compensate* copyright holders for the statutory privilege of exploiting their public-performance rights.

64. Congress did not want to risk any possibility that changes in technology would render the transmit clause a nullity. Congress could not envision every technology that would develop, but it presumably could have imagined the possibility of a cable company using a thousand antennas on the top of a hill, instead of one big one. And a Congress that enacted a statute that reaches transmission “by any device or process” and was intended “to include all conceivable forms and combinations of wired or wireless communications media,” *id.*, surely would have thought that statute precluded a workaround by a cable company with a thousand antennas on a hill. After all, such a redesigned cable system still would have been a business built on the unlicensed transmission of performances of copyrighted works, thus violating the central objective of the transmit clause.

This history forecloses any conceivable argument that Aereo’s technological design somehow immunizes it from liability for infringement of Petitioners’ public-performance rights. Just like the cable companies Congress enacted the transmit clause to reach, Aereo is in the business of offering access to copyrighted content to the public for a profit. No amount of miniature antennas or gratuitous copies can change that reality. Indeed, Aereo openly markets itself as an alternative to the very cable services that prompted enactment of the transmit clause, yet somehow insists that it need not seek permission or provide compensation to offer the same basic service.

Aereo is mistaken. It is no more a mere equipment provider than a cable or satellite

company; it is clearly performing the content it uses to market its service. And its simultaneous retransmission of “live TV” to paying strangers is no more private than the live retransmissions of cable and satellite companies. A service that offers to retransmit “live TV” to anyone willing to pay a fee clearly is offering to retransmit to the public. It is simply implausible that Congress could have intended its broad and technology-neutral statute to empower Aereo to do what everyone else cannot, solely because of the Rube Goldberg-like contrivance Aereo has developed for doing so. Any construction of the transmit clause that suggests otherwise necessarily fails.

## **II. The Second Circuit’s Construction Of The Transmit Clause Is Fundamentally Flawed.**

Notwithstanding the obvious reality that Aereo offers exactly the kind of service that Congress enacted the transmit clause to reach, the Second Circuit concluded that when Aereo simultaneously retransmits the same broadcast of a television program to thousands of paying strangers, it is engaged in thousands of “private” performances that do not implicate Petitioners’ exclusive rights *at all*. That implausible result rests on a novel and flawed reading of the transmit clause that is impossible to reconcile with the text and Congress’ manifest intent.

According to the Second Circuit, whether Aereo is infringing upon Petitioners’ public-performance rights turns not on whether Aereo “transmit[s] ... a performance ... of the work ... to the public,” 17 U.S.C. § 101, but rather on whether the public at large is capable of receiving *each distinct*

*transmission* through which Aereo does so. By that logic, solely because Aereo uses individualized antennas and copies to send each of its subscribers a separate transmission of whatever television program he or she chooses to watch, Aereo's simultaneous retransmission of the same program to thousands of paying strangers is not "to the public." In other words, notwithstanding Aereo's functional equivalence to a hypothetical cable company with a thousand antennas instead of one, it is not engaged in public performance.

That conclusion is every bit as illogical as it sounds. The court purported to derive it from a subordinate clause in the second half of the transmit clause that merely confirms that an alleged infringer is transmitting "to the public" regardless of "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.* Although Congress plainly included that language to underscore the *breadth* of the clause, and to confirm what does *not* matter when determining whether a performance has been transmitted or otherwise communicated "to the public," the Second Circuit instead construed it as the key to substantially *narrowing* the statute. In the Second Circuit's view, a communication is only to the public if multiple members of the public are "capable of receiving' *a particular transmission of a performance*" of the copyrighted work. Pet.App.18a.

One glaring problem with the Second Circuit's construction is that it renders a significant part of the language from which it is purportedly derived

entirely superfluous. Congress said explicitly that an alleged infringer is transmitting a performance to the public even when “members of the public capable of receiving the performance or display receive it ... *at different times.*” 17 U.S.C. § 101 (emphasis added). Of course, it is essentially impossible for two people to receive *the same transmission* of a performance “at different times.” Accordingly, even the Second Circuit was forced to acknowledge that its reading of the transmit clause renders that language superfluous. See Pet.App.21a n.11 (conceding that *Cablevision’s* “focus on the potential audience of each particular transmission would essentially read out the ‘different times’ language”). That violation of “one of the most basic interpretive canons,” *Corley v. United States*, 556 U.S. 303, 314 (2009), is no small matter, especially when Congress clearly included this language to *broaden* the definition of “to the public” and foreclose circumvention of its intent through the simple expedient of making multiple transmissions of the same performance.

Of course, the Second Circuit’s reading of the statute suffers from the equally fundamental problem that the transmit clause does not say “capable of receiving the *transmission.*” It says “capable of receiving the *performance or display.*” 17 U.S.C. § 101 (emphasis added); see, e.g., Jane C. Ginsburg, WNET v. Aereo: *The Second Circuit Persists in Poor (Cable)Vision*, MediaInstitute.org (April 23, 2013), <http://bit.ly/1nWUgQL> (“The Second Circuit conflated ‘performance’ with ‘transmission’ .... This reading does not work in terms of the statute.”); *supra* n.2 (collecting numerous courts and commentators that have criticized the Second

Circuit’s reasoning); *see generally Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) (“courts must presume that a legislature says in a statute what it means and means in a statute what it says there”).

“Transmit” and “perform” are each defined terms with their own distinct meanings. 17 U.S.C. § 101. Had Congress intended liability for infringement to turn on whether each distinct *transmission* of a performance is accessible to the public, it would have been easy enough for Congress to say so (although it would have required more than merely substituting “the transmission” into the statute, as doing so would have rendered nonsensical the resulting reference to transmissions received “at different times”). But that would have been a very different statute—a statute that would have allowed a retransmission service to reach countless members of the public as long as it did so through separate transmissions. That is decidedly not the result Congress intended. Congress referred to “the performance or display” and not “the transmission” precisely because it sought to capture someone who is transmitting *the same performance* (e.g., the Super Bowl) to the public, even if members of the public are watching it in the privacy of their homes, even if they are watching it at different times, and without regard to the precise “device or process” through which they receive it.

And that leads to a third problem with the Second Circuit’s construction of the transmit clause—it places dispositive weight on the “device or process” by which a performance is transmitted to the public, when Congress could not have been more emphatic

that it wanted to capture transmitting a performance to the public “by means of any device or process.” 17 U.S.C. § 101. It is both a hoary principle of statutory construction and a basic tenet of common sense that a court should “never adopt an interpretation” of a statute “that will defeat its own purpose” by rendering “evasion of the law ... almost certain.” *The Emily*, 22 U.S. 381, 388, 390 (1824). And yet that is precisely what the Second Circuit’s interpretation would do. The technical details of Aereo’s system for retransmitting broadcast television to the public were absolutely critical to the Second Circuit’s conclusion that Aereo is making thousands of private performances. But Congress made crystal clear that the precise details of the “device or process” by which the public receives the performance—whether through a particular kind of transmission or through other means of communication, whether at the same time or different times—do not matter. What matters is whether an alleged infringer is transmitting or otherwise communicating a performance or display of a work to the public “by means of *any* device or process.” 17 U.S.C. § 101 (emphasis added). Under any sensible reading of that language, Aereo is doing just that.

Indeed, the Second Circuit’s startling conclusion that Aereo is *not* publicly performing is perhaps the most telling sign that its construction of the transmit clause cannot be correct. After all, Aereo’s unauthorized retransmission service is not merely a step down the proverbial slippery slope; it is at the bottom. The very clause that the Second Circuit relied upon makes clear that an alleged infringer is performing to the public even when viewers watch

the performance “at *different* times.” And yet Aereo trumpets its ability to allow consumers to “watch TV live”—*i.e.*, to allow thousands of people to watch the performance at *the same* time. Congress could hardly have intended such an incongruous result.

Even the Second Circuit has recognized the massive problems its statutory construction creates, acknowledging that it “would essentially read out the ‘different times’ language.” Pet.App.21a n.11. The court attempted to cure that redundancy by devising “an exception” to its distinct transmissions rule “when private transmissions are generated from *the same copy* of the work.” Pet.App.22a (emphasis added); *see also Cablevision*, 536 F.3d at 137–38. Why that should matter is a mystery, however, as the transmit clause says not a word about whether transmissions originate from a single copy of a performance (let alone whether the public is capable of receiving a transmission of a performance, rather than the performance itself). The Second Circuit’s felt need to read into the statute a solution to a problem of its own making is all the more reason to reject its deeply flawed construction.

The Second Circuit alternatively suggested that its reading was necessary to avoid rendering a “hapless customer” 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.” *Id.* at 136. That puzzling contention only underscores the depths of the *Cablevision* court’s confusion. The transmit clause is concerned not with whether *someone else* transmitted a performance of the work to the public before the



alleged infringer did, but rather with whether *the alleged infringer* is transmitting the performance to the public. When an individual uses a DVR to record and then retransmit a recording of a broadcast of the Super Bowl to his family in his home, his private performance does not somehow become public just because the broadcast that he recorded was to the public in the first instance. But when a cable company uses a combination of strategically placed antennas and cables to retransmit a live broadcast of the Super Bowl to its subscribers, it is transmitting to the public. So, too, is Aereo when it uses strategically placed miniature antennas, unique copies, and a centralized server to retransmit that broadcast of the Super Bowl to thousands of paying strangers over the Internet.

At bottom, there is simply nothing to recommend the Second Circuit's illogical reading of the transmit clause. Not only is it wholly irreconcilable with the text of the statute, but it would render meaningless all of Congress' careful efforts to guard against the elevation of technological detail over functionality. The transmit clause focuses on what an alleged infringer is doing, not the "device or process" by which the alleged infringer is doing it. Aereo is transmitting performances of copyrighted works to the public. That is public performance, plain and simple.<sup>5</sup>

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<sup>5</sup> Although *Cablevision's* interpretation of the transmit clause is patently incorrect, that does not mean that *Cablevision's* result necessarily is as well. How the transmit clause or other portions of the Copyright Act should apply to a licensed provider that offers a remote storage DVR service such as the one at

### **III. Aereo's Contrary Arguments Imperil The Very Innovation Copyright Protection Is Meant To Foster.**

The plain text of the statute and Congress' manifest intent to reach all retransmission services are more than enough to foreclose Aereo's efforts to escape liability for its blatant infringement. But the problems with Aereo's arguments run much deeper than their incompatibility with the statute. Its arguments strike at the heart of the "philosophy behind the" Copyright Clause "that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Eldred*, 537 U.S. at 212 n.18. In seeking to wrest from copyright holders control of one of the core exclusive rights the law secures, Aereo threatens to chill the very innovation copyright protection is meant to foster.

It is no surprise that this Court has had little tolerance for business models premised on the unauthorized exploitation of the copyrighted works of others on a "gigantic scale." *Grokster*, 545 U.S. at 940. The entire enterprise of "secur[ing] a fair return for an 'author's' creative labor," *Aiken*, 422 U.S. at

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issue in *Cablevision*, and specifically to the playback of a time-shifted recording to a single subscriber's set-top box in the home, is a question different from the one presented in this case. This Court need not resolve or even consider that question in order to conclude that the transmit clause does not empower Aereo to retransmit live broadcasts of copyrighted content to thousands of members of the public without obtaining any kind of license at all.

156, would be undermined completely if third parties could reap the benefits of those labors without obtaining authorization from or paying compensation to the author. That is the central principle underlying copyright law, and the broadcast television industry is no exception. Collectively, broadcasters spend billions of dollars creating and acquiring their copyrighted content. Although they have agreed to make that content available to the public over the air for free, they can afford to do so only if they retain the ability to recoup their substantial investments by, among other things, generating critical revenue when that content is retransmitted to the public.

Aereo is a direct assault on that regime. Aereo has built an entire business around the unauthorized exploitation of broadcasters' copyrighted content. It seeks to siphon off cable and satellite subscribers by offering this content for a lower fee, which it can do only because, unlike its competitors, Aereo does not compensate copyright owners for its use. Rather than recognize that business model for what it is—a blatant and unapologetic violation of copyright law—the Second Circuit legitimized it. In doing so, the court created a gaping hole in copyright law that threatens the very existence of broadcast television as we know it.

Aereo's own deliberate circumvention of copyright law is troubling enough, but it is the implications of Aereo's legal argument that are truly destabilizing. For the time being, Aereo has offered its subscribers only local broadcast programming, but that is just a voluntary decision and an artifact of

Aereo's current business model. If Aereo is correct that its retransmissions are not public performances at all, then its logic would seem to suggest that it could retransmit New York broadcasts live to viewers in California—or even to viewers in London or Beijing.

But Aereo is really just the tip of the iceberg. If the transmit clause could be circumvented through the simple expedient of simultaneously supplying each user with a distinct transmission generated from a distinct copy, then cable and satellite companies could potentially devise Aereo-like workarounds of their own, and in the process render the transmit clause a dead letter. Indeed, the ink on the Second Circuit's decision was barely dry when proposals for exploiting it began to surface. *See, e.g.*, Pet.34–35; Pet.App.130a–31a. That result would fly in the face of Congress' careful efforts to guard against the risk of technological advancement rendering the transmit clause obsolete. *See supra* Part I. It also could be devastating to the future of broadcast television, the providers of which “have come to rely more heavily on retransmission fees” in recent years to continue “to make their free public broadcasts profitable.” Pet.App.132a.

And it is not just fees from cable and satellite companies that they may stand to lose. Broadcasters have hardly been oblivious to the reality that there is an ever-growing demand for online access to their programming. To the contrary, they have been as eager as anyone to capitalize on this demand by developing their own technologies and licensing agreements to offer online access to content. For

instance, ABC recently launched Watch ABC, an application that allows cable subscribers in certain regions to watch ABC's broadcasts live over the Internet, and Fox negotiated the rights to provide live online access to its broadcast of the Super Bowl. As is their right, however, both broadcasters and owners of the content they provide have been careful to go about meeting this consumer demand in ways that maximize, rather than undermine, the value of their copyrighted content—not only by demanding compensation from those licensed to distribute or retransmit that content, but also by, among other things, controlling whether that content is made available in ways that advertisers do not measure, or to west coast viewers on the same schedule as east coast viewers. All of those efforts—and the critical licensing agreements broadcasters have negotiated—would go by the wayside if Aereo were allowed to seize control of those decisions and retransmit broadcasters' copyrighted content in whatever way is best for *Aereo's* bottom line.

Indeed, if that is the world in which broadcasters must live, then they may be forced to reconsider whether they can afford to continue making the same quantity and quality of programming available to the public for free in the first place. See Pet.App.131a (noting that some broadcasters have considered “mov[ing] their free public broadcasts to paid cable” to “protect their copyrighted material”). That consequence of Aereo's legal theory would be most unfortunate. “[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.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994). That is no less true today. Millions of Americans still rely on free over-the-air broadcasts to receive television programming. See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd. 10496, 10592–93 (2013). And broadcast television not only continues to carry the majority of the country’s most popular shows, but also remains a critically important source of local and national news.

All of that just underscores that there is far more at stake here than Aereo, or retransmission fees, or even the future of broadcast television. What is at stake is the basic right of every copyright holder to determine if, when, and how to make its copyrighted work available to the public. As the Register of Copyrights has noted, robust protection of that right—and, in particular, the public-performance right—has never been more important to the continued development of copyright works than it is at this moment, when content can be both accessed and made available through the simple click of a mouse, and individuals are increasingly more reliant on the Internet to obtain it. See Maria A. Pallante, *The Next Great Copyright Act*, 36 Colum. J. L. & Arts 315, 322 (2013) (“the public performance right [is] more important than ever”).

Of course, the technological advancements of the Internet age are fully capable of furthering the interests of both the public and the copyright holder, such as when Netflix pays for a license to transmit a movie, or Apple pays for a license to distribute a song. As these arrangements readily confirm,

copyright protection need not fall by the wayside for innovation to continue. The history of online music distribution over the past decade is a case in point. The demise of early file-sharing services that fostered infringement on a “gigantic scale,” *Grokster*, 545 U.S. at 940, did not sound the death knell for online distribution of music. To the contrary, it paved the way for the rapid growth of *licensed* distribution services such as iTunes, which provide affordable access to music without depriving copyright holders of the fruits of their labors. See, e.g., Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. Times, Feb. 27, 2013, at B3.

Post-*Grokster* experience thus teaches that, in the end, there is no real tension between protecting copyright and fostering innovation and widespread, inexpensive access to content. The real choice is between incentivizing the development of technology that more efficiently transmits, performs, or displays content while respecting copyrights, or incentivizing technology that offers no real advances, but simply provides a superficial basis for eluding copyright liability. Again, broadcast television is no exception. A robust and affordable market for *licensed* online distribution of broadcast television content already exists through services such as Hulu, Netflix, Amazon, and Watch ABC. As that market reflects, Congress’ incentive scheme is working just fine: Online access to broadcast television content and other copyrighted works was available long before Aereo came on the scene, and so long as those who retransmit copyrighted content to the public continue to *compensate* copyright holders for the rights to do

so, online access will continue to be available once Aereo is gone.

In seeking to avoid providing that compensation, Aereo seeks to upend not only our own copyright law, but also our compliance with international obligations. The United States is a signatory to and has been a driving force behind multiple international agreements that enshrine the same broad and technology-neutral public-performance right that the transmit clause was designed to protect. For instance, article 11 of the Berne Convention provides that the “[a]uthors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; [and] (ii) any communication to the public of the performance of their works.” Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (Paris Text 1971, *as amended* Sept. 28, 1979), 25 U.S.T. 1341; *see also id.* art. 11*bis*(ii) (recognizing exclusive right to authorize “any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one”); World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1), Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994) (incorporating articles 1–21 of Berne Convention); World Intellectual Property Organization Copyright Treaty, art. 1(4), Dec. 20, 1996, 36 I.L.M. 65 (1997) (“WCT”) (same). The WCT further defines the exclusive rights of the copyright



holder to include “the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.” WCT art. 8.

In keeping with these agreements, the United States also has entered into multiple Free Trade Agreements protecting the broad and technology-neutral public-performance right. And in approving these agreements, Congress repeatedly and expressly has confirmed its understanding that domestic copyright law already protects the same broad and technology-neutral right. As all of these agreements illustrate, Aereo’s cramped and hyper-technical view of the public-performance right is fundamentally incompatible not just with Congress’ judgments in the Copyright Act, but with norms of copyright law worldwide—norms developed largely to reflect settled understandings of what U.S. law protects, no less. In fact, decisions from courts of other signatories to these agreements have rejected arguments nearly identical to Aereo’s and held that materially analogous online retransmission services are engaged in copyright infringement. *See, e.g.*, Case C-607/11, *ITV Broad. Ltd v. TVCatchup Ltd.*, 2013 E.C.R. I-0000; *Nat’l Rugby League Inv. Pty. Ltd. v Singtel Optus Pty. Ltd.*, [2012] FCAFC 59 (Austl.); *see generally* Jane C. Ginsburg, *Aereo in International Perspective: Individualized Access and U.S. Treaty Obligations*, MediaInstitute.org (Feb. 18, 2014), <http://bit.ly/1jXXJ4b>.

Contrary to Aereo’s alarmist suggestions, a decision from this Court reaching the same conclusion need not threaten the future of “cloud

computing” technology, or any of the readily distinguishable services to which Aereo attempts to analogize itself. There is an obvious difference between a service that merely stores and provides an individual user access to copies of copyrighted content that the user already has legally obtained, and a service that offers the copyrighted content itself to the public at large.

Of course, it is no accident that Aereo seeks to make this case about cloud computing, the RS-DVR, hardware providers, or anything other than its own business model. The debate has to be refocused on something else, because Aereo’s own business model is essentially indefensible in light of the plain text of the statute and Congress’ manifest intent. “[T]his wolf comes as a wolf.” *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Aereo has built an entire business model around the unauthorized commercial retransmission of Petitioners’ copyrighted content to the public. That is precisely what Congress enacted the transmit clause to prevent. Indeed, the very fact that the Second Circuit’s reading of the statute would not prohibit Aereo’s conduct is evidence enough that it cannot be right. Aereo is in the business of retransmitting performances of copyrighted works to the public. Nothing about the Rube Goldberg-like contrivance through which it does so provides even the slightest basis for concluding otherwise.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

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

RICHARD L. STONE\*  
 AMY M. GALLEGOS  
 JENNER & BLOCK LLP  
 633 West 5th Street  
 Los Angeles, CA 90071  
 (213) 239-5100

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

BRUCE P. KELLER†  
 JEFFREY P. CUNARD  
 DEBEVOISE &  
 PLIMPTON LLP  
 919 Third Avenue  
 31st Floor  
 New York, NY 10022  
 (212) 909-6000

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\* *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.*

## **APPENDIX**

## **STATUTORY APPENDIX**

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**U.S. Const. art. I, § 8, cl. 8**  
**Copyright Clause**

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

**Relevant Statutory  
Provisions Involved**

**17 U.S.C. § 101  
Definitions**

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

\* \* \*

A “device”, “machine”, or “process” is one now known or later developed.

\* \* \*

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

\* \* \*

To “perform” a work means 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.

\* \* \*

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



3a

(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 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.

\* \* \*

To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

#### **17 U.S.C. § 106**

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

\* \* \*

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

\* \* \*