No. 13-461

# In The Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., ET AL.,
PETITIONERS,
*v.*

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

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF OF COMPETITION LAW PROFESSORS, SOUTHWESTERN LAW STUDENT ANDREW PLETCHER, AND PROFESSOR MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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## INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Respondent. Warren Grimes is a professor of law at Southwestern Law School where he teaches and writes about antitrust law and communications law issues. He is the co-author (with Professor Lawrence A. Sullivan) of a noted treatise: The Law of Antitrust: An Integrated Handbook (2d ed. 2006).

Shubha Ghosh is a professor of law at the University of Wisconsin Law School who has written extensively on intellectual property policy as it relates to competition and innovation. Robert H. Lande is the Venable Professor of Law at the University of Baltimore School of Law. He is the co-founder and director of the American Antitrust Institute, and twice the recipient of the Cohen Award for the best antitrust and trade regulation scholarship.

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[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. This brief was researched and prepared in the Amicus Project Practicum at Southwestern Law School.

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Amicus Andrew Pletcher is an upper-division J.D. candidate at Southwestern Law School with extensive academic interest and professional experience in the entertainment industry. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. He is the Supervising Editor of the Journal of International Media and Entertainment Law, published by the American Bar Association and the Donald E. Biederman Entertainment and Media Law Institute.

Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in correct, consistent interpretation of copyright law that allows for the emergence of new technologies that benefit both copyright holders and the general public.

## SUMMARY OF THE ARGUMENT

The Aereo system is a healthy free-market response to a dysfunctional and anticompetitive television distribution system that raises prices, reduces output, and denies consumers meaningful choice. Petitioners predictably oppose any new technology that could change the status quo that is highly beneficial to them.

Petitioners come before this Court as beneficiaries of two limited government monopolies: Each Petitioner has been granted free access to the public spectrum in return for a commitment to serve the public interest by providing local news and public affairs programming. In addition, Petitioners and their business partners have been granted certain exclusive rights under copyright law that assures a fair return in the free market for creative investment in broadcast television.

Petitioners seek to undermine their public interest obligation to free, over-the-air local television by invoking copyright law. However, their interpretation is at odds with the venerable telecommunications policies established by Congress, implemented by the Federal Communications Commission, and repeatedly recognized by this Court. If accepted, Petitioner's interpretation will undermine essential First Amendment values of assuring the public has access to a multiplicity of information and opinion.

The relief Petitioners seek is at odds with both copyright and antitrust law. Copyright law supplies the economic incentive to create by granting the

author limited exclusive rights of exploitation to ensure a fair return in the free-market. The Aereo system simplifies access to over-the-air broadcast television that ensures a fair return for Petitioners through increased advertising revenue. The Sherman Antitrust Act protects competition and is designed to ensure consumer welfare, a concept that includes maximizing output, quality, and consumer choice. Granting Petitioners' relief would decrease the output of local television broadcasting and leave consumers with very limited, technologically deficient and expensive choices for obtaining local programming.

## ARGUMENT

### I. TECHNOLOGY SUCH AS AEREO'S EXPANDS THE WIDE DISSEMINATION OF CREATIVE AND ESSENTIAL BROADCASTING IN FURTHERANCE OF THE GOALS OF THE FIRST AMENDMENT AND COMMUNICATIONS LAW.

#### A. The Substantial Public Interest In Broadcasting.

Broadcasting plays an essential role in the marketplace of ideas. Local television broadcasting is a vital local service that provides the public with access to "social, political, esthetic, moral and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). The importance of local broadcasting "'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 Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("*Turner I*")

(quoting *United States v. Southwestern Cable Co.,* 392 U.S. 157, 177 (1968)).

Congress granted the Federal Communications Commission ("Commission") "comprehensive powers" over the broadcast spectrum. *Southwestern Cable Co.*, 392 U.S. at 173 (citing *National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943)). Because of spectrum scarcity, the drafters of the Communications Act of 1934 gave the Commission power to grant broadcast licenses based on consideration of "public convenience, interest, or necessity." 47 U.S.C. § 307(a). This has been commonly called the "public interest" standard.

The overall goal of Congress was to maximize the benefits of the spectrum for the people of the United States. Section 303(g) of the Communications Act of 1934 provides for "the larger and more effective use of the radio in the public interest." *National Broadcasting Co.,* 319 U.S. at 217. To ensure this goal, Congress determined the spectrum should be allocated to give each community an over-the-air source of information in exchange for broadcasting matters of local concern. *Turner I,* 512 U.S. at 663 (citing *Southwestern Cable Co.,* 392 U.S. at 173-74 (1968)).

As sales of televisions increased in the 1940's, the demand grew for broadcast over-the-air television in areas beyond local signal coverage. *See* James C. Goodale & Rob Frieden, *All About Cable* § 1.02 (2006). The earliest cable systems (called local community antenna systems or "CATV") were created to extend broadcasting signals to areas where reception was "non-existent or difficult."

*Clarksburg Pub. Co. v. FCC*, 225 F.2d 511, 516-17 n.16 (D.C. Cir. 1955) (describing the early CATV systems). These systems were limited to the retransmission of broadcast stations and posed no threat to over-the-air broadcasting. The systems "could carry only a few channels, reflecting the state of transmission technology and the scarcity of nearby channels to retransmit." Robert W. Crandall & Harold Furchtogott-Roth, *Cable TV: Regulation or Competition?* 1-2 (1996).

Over the next thirty years, local community antenna systems quickly grew. In 1962, the Commission began limiting CATV systems in an effort to protect local broadcasters. There was increasing fear that the unregulated importation of CATV systems could cause the demise of local television broadcasting. "We think the record amply supports the Commission's conclusion that the unconditional grant of appellant's application would probably result in the demise of [local broadcasting.]". *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 365 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 951 (1963).

In the 1980's, television entered a long period of deregulation. *See* James C. Goodale & Rob Frieden, *All About Cable* §1.14 (2006) (discussing the 1984 Cable Act). Although there was substantial growth for the cable industry, consumers complained about rising prices and dismal customer service. In 1992, Congress responded by enacting the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act"). *See Turner I,* 512 U.S. at 630-32 (describing the Act's provisions). In the Act, Congress affirmed

the "substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming." §2(a)(12), 106 Stat. 1461. Congress found "broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." 1992 Cable Act §2(a)(11). 106 Stat. 1461.

In 1994, this Court affirmed the "important and substantial federal interest" in the preservation of broadcast programming. *Turner I,* 512 U.S. at 647 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)). Broadcasters make a "valuable contribution to the Nation's communications system" and the 1992 Cable Act was designed to "ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming – whatever its content." *Turner I,* 512 U.S. at 649. "The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene." *Id.* at 663.

Petitioners enjoy the benefits of two government-granted limited monopolies: A free license to obtain the public spectrum, worth millions of dollars, in exchange for providing valued local news and informational programming; and a limited copyright monopoly on in-house programming, ensuring a fair return as an incentive to produce creative content.[2] They seek from this Court relief that undermines the

[2] Petitioners also enjoy limited rights as exclusive licensees of other copyright holders that create television programming.

availability of over-the-air broadcasting to increase profits from their individual copyright interests.

Petitioners are free to relinquish their valuable broadcast license to explore exploiting their copyright interest on channels without public interest requirements such as subscription-only channels or paid-download applications. Instead, Petitioners have opted to continue benefiting from the distribution of their programming via spectrum broadcasting because it remains the most widely accessible method of television viewing. As long as they do so, they must uphold their end of the bargain by supporting the wide accessibility of broadcast television.

### B. **Aereo Promotes First Amendment Values By Simplifying Public Access To Free Broadcast Television.**

"Assuring the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I,* 512 U.S. at 663; *see also Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 226-27 (1997) (Breyer, J., concurring) (discussing the First Amendment rights of the over-the-air broadcast viewer). This interest is a cornerstone of our democratic government and a "basic tenet of our national communications policy." *United States v. Midwest Video Corp.,* 406 U.S. 649, 668 n.27 (1972) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). Broadcast television furthers public access to the "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Aereo strengthens central First Amendment values by expanding public access to essential local news, educational, and public affairs programming. The Aereo system is designed to mirror the operation of a traditional, rooftop antenna that allows the user to control every aspect of a broadcast program from their laptop, tablet, or smartphone. When a user logs onto the system, an individual antenna is automatically assigned to that user and turns to the broadcast channel they select. Because a user watches programming via a remote antenna housed on Aereo's premises, the broadcast signal is potentially free of many of the technical limitations of the digital spectrum and cannot be "blacked out" because of broadcaster disputes beyond the television viewer's control.

### 1. **The technical limitations of digital over-the-air spectrum broadcasting.**

The 2009 transition to digital over-the-air broadcasting resulted in some Americans being unable to access over-the-air broadcast television because of increased limitations of the broadcast spectrum. While digital signals offer many added benefits including higher picture quality and multicasting, the transition forced many Americans to purchase new technology to receive free over-the-air local news and public affairs programming.[3]

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[3] The United States attempted to alleviate the transition's burden on consumers by providing for a digital-to-analog converter box coupon program. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 23 §§ 3005(a)-3005(b). A converter box allowed the consumer to convert any channel broadcast in digital television service into a format that the

Compared to analog signals, digital signals have a higher drop-off in field strength as the signal increases in distance from the source. *Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd. 19504, 19512 (2005); Glenn Doel, *ITU/ASBU Workshop on Frequency Planning and Digital Transmission*, International Telecommunication Union (Nov. 23rd, 2004), http://tinyurl.com/Digitalspectrum (comparing analog and digital signal drop-off). With an increase in distance, there is a particular point where the digital signal can no longer be processed by the antenna resulting in the "'digital cliff effect,' so-called because reception is either perfect or non-existent." James Miller & James E. Prieger, *The Broadcasters' Transition Date Roulette: Strategic Aspects of the DTV Transition*, 9 J. Telecomm. & High Tech. L. 437, 448 (2011).

In addition, compared to analog signals, digital signals suffer from an increase in interference from large hills, buildings and man-made objects. The Commission has referred to this problem as "building loss." *Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd. 19504, 19548 (2005); Roy Furchgott, *The Downside to Digital TV*, N.Y. Times, April 24, 2008, at C6 (noting digital reception is "more easily blocked" than analog reception).

Finally, the reception of digital broadcast signals is heavily dependent on the height and quality of the antenna. The Commission has set the digital signal

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consumer can display on television receivers designed to receive and display analog television service.

strength model on an assumption of an outdoor antenna thirty feet above ground level. *The Digital TV Transition: Reception Maps*, Federal Communications Commission, http://tinyurl.com/digitaltvmap (last visited Mar. 31, 2014). The model fails to account for over-the-air reception difficulties affecting viewers in urban areas who live in large multi-unit buildings without access to a rooftop antenna. *See* Leadership Conference on Civil Rights, *Transition in Trouble: Action Needed to Ensure A Successful Digital Television Transition* 25 (2008) (citing a Centris market research firm study) ("These digital gaps are not confined to sparsely populated rural areas; rather . . . millions of viewers in New York, Los Angeles, Boston and other major metro areas will experience digital gaps in coverage.").

2. **Aereo provides access to broadcast television during blackouts disputes between broadcasters and distributors.**

Aereo's system allows cable and satellite customers to access local, over-the-air broadcasting during dispute blackouts between programmers and distributors. The 1992 Cable Act recognized that the common ownership of cable operators and programmers made it more difficult for localized programmers to secure carriage. 1992 Cable Act §2(a)(5). Because of the unique nature of cable television, the operator could "prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike other speakers in the media, can thus silence the voice of competing speakers with a mere flick of the switch." *Turner I*, 512 U.S. at 656.

This Court acknowledged cable television distributors are the "gatekeeper[s]" of programming delivered into American households. *Id.* Their ability to "flick the switch" and turn off programming runs afoul of the "government purpose of the highest order" in assuring "'the widest possible dissemination of information from diverse and antagonistic sources.'" *Turner I,* 512 U.S. at 663-64 (quoting *United States v. Midwest Video Corp.,* 406 U.S. 649, 668 n.27 (1972) (plurality opinion)).

In recent years, Americans have increasingly suffered the "flick of the switch" from disagreements between broadcasters and distributors. As a result of the "must-carry" provisions dictated under the 1992 Cable Act, each cable operator must carry the signals of the local commercial broadcast television stations or negotiate directly with distributors for their programming. 47 U.S.C. § 534(a) ("must carry"); 47 U.S.C. § 325(b) (retransmission). If a broadcaster and a distributor are unable to reach an agreement, a distributor may not retransmit the broadcaster's signal and cable subscribers are blacked out. 47 U.S.C. § 325(b)(1)(A).[4]

Between 2010 and 2013, television blackouts have increased from an average of twelve to one hundred and twenty-seven a year. American Television Alliance, *How Long Before We're All In the Dark?* 1 (2013), *available at* http://tinyurl.com/howlongindark; *see* American Television Alliance, *Broadcaster Retransmission*

[4] Congress later extended the "must-carry" provisions to satellite carriers in 1999 through the Satellite Home Viewer Improvement Act. 17 U.S.C. § 122.

*Blackouts 2010-2013* (2014) (listing blackouts and their affected markets). The blackouts have prevented access to critical sources of local news, public affairs and national programming, including the World Series and the Academy Awards. *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, 26 FCC Rcd. 2718, 2726 (2011). While some blackouts have been resolved in a matter of weeks, one standoff blackened TV screens for 10 months in thirteen markets. Michael L. Katz et. al., *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* 42-44 (2009).

## II. TECHNOLOGY SUCH AS AEREO'S PROVIDES CONSUMERS A MEANINGFUL ALTERNATIVE TO A BLOATED ANTICOMPETITIVE TELEVISION DISTRIBUTION MODEL WITHOUT DENYING COPYRIGHT OWNERS A FAIR RETURN.

### A. The Aereo System Furthers Petitioners' Economic Incentive To Create By Increasing Overall Advertising Revenue.

Both parties ask this Court to interpret the "public performance" right as applied to a new technology neither discussed nor anticipated by Congress in the 1976 Copyright Act. This Court has determined that when technology has rendered a literal term ambiguous, the Copyright Act "must be construed in light of [its] basic purpose." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Copyright law was created to "stimulate artistic creativity for the

general public good" so that the public can receive the general benefits from the author's labor. *Sony Corp. of Am.,* 464 U.S. at 432 (citing *Aiken*, 422 U.S. at 156). The relationship between the author and the public is complementary. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

Copyright law "supplies the economic incentive to create and disseminate ideas." *Golan v. Holder*, 132 S.Ct. 873, 890 (2012) (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)) (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985)). Copyright provides "the necessary bargaining capital to garner a fair price for the value of the works passing into the public use." *Stewart v. Abend*, 495 U.S. 207, 229 (1990) (citing *Harper & Row Publishers, Inc.* 471 U.S. at 546). It "assures contributors to the store of knowledge a fair return for their labors." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985) (citing *Aiken,* 422 U.S. at 156). The United States Copyright Office follows this interpretation. Maria A. Pallante, *The Next Great Copyright Act*, 36 Colum. J.L. & Arts 315, 340 (2013) (citing *Aiken*, 422 U.S. at 156) ("In the words of the Supreme Court, '[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor . . .'"). Copyright law, by giving the creator limited exclusive rights, establishes a system that rewards the creator within the confines of a free-market system.

Unlike producers of most tangible goods, producers of creative works benefit from a higher ratio of fixed to marginal costs over the length of the work's market demand. Mark A. Lemley, *Property,*

*Intellectual Property, and Free Riding,* 83 Tex. L. Rev. 1031, 1053 (2005). "The production of any good involves fixed costs investments, which must be made before production, and variable or marginal costs, which are incurred each time a new unit is produced." *Id.* Petitioners argue their ability to recoup their "substantial investment" in creative programming is undermined by Aereo's technology. Br. for Pet'r at 21, *American Broadcasting Companies, Inc. v. Aereo, Inc. F/K/A Bamboom Labs, Inc.,* No. 13-461 (Feb. 24, 2014). However unlike tangible goods, the cost for reproduction and distribution of copyrighted work is low. *See* Lemley, *Property, Intellectual Property, and Free Riding,* 83 Tex. L. Rev. at 1053. Petitioners generally own copyrights for local programming they produce and, in many cases, co-own nationally broadcast programming. In either case, as they exploit this ownership through the various avenues of distribution, from licenses to foreign broadcasters to iTunes, their ratio of fixed to marginal costs drops and their net revenues increase rapidly. *See id.* at 1054. Regardless of whether Petitioners do or do not have an interest in the copyrighted programming, they will benefit from Aereo's technology through increased viewership of broadcast television and enhanced advertising revenues.

The Aereo system will help Petitioners maximize their advertising revenue. To determine the price of advertising for a particular program, Petitioners track audience viewership via the Nielsen ratings system. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd 10496, 10592 (2013). These measurements assist

broadcasters in their ability to negotiate advertising rates. *See id.* (describing how advertising prices are determined). In recent years, Nielsen has expanded its definition of a television viewer as new technologies are introduced. *See e.g.,* Michael O'Connell, *Nielsen Formalizes Plans to Incorporate Mobile Views Under TV Ratings Purview*, Hollywood Reporter (October, 27, 2013, 10:28 AM) http://tinyurl.com/HRNielsen (discussing adding TV impressions from Twitter to the traditional television measurement).

"Aereo is willing to have its subscribers' viewing habits measured by Nielsen." *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 398 n.12 (S.D.N.Y. 2012) (citing Kanojia Decl. ¶ 39). Through Aereo's technology, Petitioners will increase their broadcast viewership by capturing "cord-cutters" and "cord-nevers." Cord-cutters are individuals who no longer pay for traditional television service through a multichannel video-programming distributor. Between 2008-2013, nearly five million American households cut their cable or satellite service costing Petitioners millions in lost retransmission and advertising revenue. *See* Convergence Consulting Group Ltd., *The Battle for the North American (US/Canada) Couch Potato: Online & Traditional TV and Movie Distribution* 10 (2013); David Carr, *More Cracks Undermine the Citadel of TV Profits*, N.Y. Times, April 13, 2013, at B1. "Cord-nevers" are an untapped market of mostly young consumers who have never signed up with a multichannel video-programming distributor. This growing consumer group utilizes alternative methods of viewing television through high-speed Internet and portable devices, including smartphones and

tablets. Ian King, *How 'Cord Never' Generation Poses Sales Drag for Pay TV,* Bloomberg (Sept. 17, 2013, 9:01 PM), http://tinyurl.com/cordnever. Aereo's technology assures Petitioners an increase in advertising revenue without requiring any additional distribution cost.

### B. The Aereo System Is A Healthy, Free-Market Response To The Expensive, Unwieldy, And Anticompetitive Bundles That Are Forced On MVPD Subscribers.

Petitioners and their *Amici* account for a large portion of all television viewing hours in the United States. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 27 FCC Rcd. 8610, 8765-66 (2012) (listing Disney, News Corp., NBC Universal, Time Warner, Inc., CBS, Viacom, and Discovery as accounting for about 95% of all television viewing hours in the United States). Many of these programmers are also affiliated in some form with the top five cable distributors.[5] *See*

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[5] Vertical integration between programmers and distributors is rapidly increasing. In 2011, regulators approved Comcast's acquisition of NBC Universal. Tim Arango & Brian Stelter, *Comcast Receives Approval for NBC Universal Merger*, N.Y. Times, Jan. 19, 2011, at B9 (the "first time a cable company will own a major broadcast network"). Recently, Comcast has proposed an acquisition of Time Warner Cable for $45.2 billion that will create the largest cable television provider in history. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 27 FCC Rcd at 8668-69 (noting the two largest cable providers are Comcast and Time Warner Cable). This would give Comcast programmers "significant leverage in contract negotiations with media companies over what TV

*id.* at 8629 ("Our review of vertical integration in early 2012 identified 127 national networks . . . affiliated with the top five cable MVPDs. Comcast has ownership interest in 78 national networks [while] Time Warner Cable has ownership interest in 12 national networks . . ."). The concentration of programming in a limited number of content creators along with increased vertical integration in the marketplace gives Petitioners greater market power to employ inter-product price discrimination or channel "bundling" in licensing their programming to outside distributors.

Since the mid-twentieth century, the cable television industry has offered cable channels in bundles, requiring consumers to purchase large numbers of channels to receive the few they actually watch. Initially, this practice was beyond the reach of competition law because cable operators had government-licensed franchise monopolies and limited technology to offer smaller, specialized packages. *See generally* Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. Pa. L. Rev. 1335 (1986) (discussing the cable television monopoly); Walter Ciciora et al., *Modern Cable Television Technology* 16-18 (2d ed. 2004) (describing coaxial cable system limitations).

The limitations have since disappeared. One in three consumers can now choose among four different forms of traditional television distribution:

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channels cable companies are willing to pay and how much they pay for them." Editorial Board, *If a Cable Giant Becomes Bigger*, N.Y. Times, Feb. 14, 2014 at A30.

a licensed cable company, a local telephone company that distributes programming with fiber optic cables, and two national satellite providers. Many remaining consumers can choose between any three of these distributors. U.S. Gov't Accountability Office, GAO-13-576, *Report to the Acting Chairwoman of the Federal Communications Commission, Video Marketplace: Competition Is Evolving, and Government Reporting Should Be Reevaluated* 9-10 (2013). Improvements in technology have made it possible to tailor smaller, specialized channel packages to consumers. *See generally* Walter Ciciora et al., *Modern Cable Television Technology* (2d ed. 2004) (describing various television distribution technology improvements including the addition of fiber-optic technology). The practice can already be seen in distributors outside the United States. *See* Warren Grimes, *The Distribution of Pay Television in the United States: Let an Unshackled Marketplace Decide*, 5 J. Int'l Media & Entertainment Law 1, 17-18 (2014) (noting "Canadian consumers have more bundling choices than their U.S. counterparts.").

Despite these improvements, channel bundling remains because television programmers wield market power to dictate to distributors the bundling and "tiering" restrictions for their channels. *Id.* at 6. Bundling forces ever-increasing monthly fees on television subscribers who have no meaningful choice among the packages that distributors offer. One source estimates that U.S. subscription TV consumers pay $30 a month more than their Canadian counterparts, who have the option to choose smaller more customized bundles. *Id.* at 6-10. In the words of Senator John McCain, the

bundling forced on consumers gives "all the 'choice' of a Soviet election ballot." Richard Sandomir, James Andrew Miller & Steve Eder, *To Protect Its Empire, ESPN Stays on Offense*, N.Y. Times, Aug. 27, 2013, at A1 (quoting Sen. John McCain).

Bundling forces all TV subscribers to subsidize individual channels that they do not wish to watch. For example, the highest priced channel on expanded basic cable is ESPN, which reportedly charges $5.53 monthly per subscriber. *Id.* Knowing the "loyal customer base" of ESPN, Disney packages ESPN with other featured cable channels owned by ABC/Disney. *Id.* This diverse bundle of programming assumes that most consumers will have the loyalty and willingness to pay a higher price for at least one of the channels in the package where ESPN is included. However, "[o]f [ESPN's] nearly 100 million households, an average of just 1.36 million viewers watched in prime time." *Id.*; *see also* Joe Flint & Meg James, *Sports Cost, Even If You Don't Watch,* L.A. Times, Dec. 2, 2012, at A1) (citing a Cox Cable estimate that sports channels are only watched by about 15-20% of consumers).

When powerful programmers dictate programming, the result can be over-investment in the wrong type of programming or in other x-inefficiencies that drives up the overall price for all MVPD subscribers. *See* Frederic M. Scherer & David Ross, *Industrial Market Structure and Economic Performance*, 667-68 (3d ed. 1990) (describing x-inefficiency). For Petitioners and their *Amici*, these over-investments could include overpaying for exclusive television rights for sports programming. Although sports fans are a small percentage of total MVPD subscribers,

many fans are likely to purchase cable or satellite service solely on the basis of whether a distributor offers exclusive television coverage of their favorite team. In 2013, Time Warner Cable paid $8.5 billion over 25 years to be the exclusive carrier of the Los Angeles Dodgers. This cost is passed along to consumers. *See* Joe Flint & Meg James, *Rising Sports Programming Costs Could Have Consumers Crying Foul*, L.A. Times (Dec. 1, 2012), http://tinyurl.com/flintjames2.

Aereo maximizes consumer choice by providing a quality affordable alternative for consumers to record and watch broadcast programming. The Aereo system gives consumers an alternative to the MVPD's basic broadcast package that provides over-the-air networks for over $30 a month. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd 10496, 10554 (2013) (noting the Broadcast Basic package of Time Warner Cable is $33.99 and provides 20 channels). Aereo simplifies access to broadcast television without complicated bundles or consideration of channel popularity. With monthly MVPD prices increasing at a rate that far exceeds inflation, the number of "cord-cutters" and "never-corders" will inevitably increase as viewers continue to look for alternatives to the massive, unwieldy and expensive television bundles.

## CONCLUSION

Technology such as Aereo's is a healthy, free-market response to an increasingly dysfunctional television distribution system that overcharges

consumers, denies them meaningful choices, and reaps anticompetitive gains for television programmers. Dissatisfied with their dual, government-granted monopolies in the broadcast spectrum and copyrighted programming, Petitioners invoke a strained interpretation of copyright law to further their stranglehold on television distribution. The relief Petitioners seek runs counter to First Amendment values and to the licensing commitment they made to serve the public interest through providing over-the-air broadcasting. For the foregoing reasons, the Court should affirm the decision below.

April 2, 2014

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