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 THE NATIONAL ASSOCIATION OF BROADCASTERS, THE ABC TELEVISION AFFILIATES ASSOCIATION, THE CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, THE NBC TELEVISION AFFILIATES, AND THE FBC TELEVISION AFFILIATES ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF AMICI CURIAE

The National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the FBC Television Affiliates Association (collectively, the "Broadcaster Associations") are associations representing the interests of television broadcasters.[1] The National Association of Broadcasters (NAB) is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating before Congress, the Federal Communications Commission, and the courts on behalf of its members. The majority of NAB's members are not large entities; they are local, independent stations.

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the FBC Television Affiliates Association represent hundreds of local television stations affiliated with the national ABC, CBS, NBC, and FOX television networks, respectively. Together, the Broadcaster Associations'

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

members serve millions of viewers in every state in the country.

The Broadcaster Associations have a compelling interest in promoting adherence to copyright and communications laws that govern public performances of television programming and retransmission of broadcast signals to the viewing public. Without these laws, broadcasters could not fulfill their obligation to offer free over-the-air television programs that meet the needs and interests of the communities they are licensed to serve. Unauthorized retransmissions of broadcast programming siphon viewers away from lawfully authorized sources, which include over-the-air broadcasts, cable and satellite subscription services, and authorized online distributors. As a result, the Broadcaster Associations' members lose advertising revenues and retransmission fees essential to recouping the significant costs of acquiring, producing, and distributing local and national programming. This undermines broadcasters' ability to create new and innovative programming and distribution mechanisms, and threatens existing programs, such as original local news and community affairs programming, that are costly to produce.

INTRODUCTION AND SUMMARY OF ARGUMENT

Quality broadcast television, delivered for free over the air by local stations, is a public good, as Congress has long recognized. But free over-the-air television is not cost-free and cannot be taken for granted. Aereo seeks to subvert a carefully constructed legal framework with a technological gimmick. If the Court were to hold that Aereo's deliberately wasteful and inefficient system can successfully circumvent the plain meaning and purpose of the Copyright Act, it would strike a serious blow to the institution of free and innovative broadcast television. The Court should instead hold that Aereo's claimed loophole in the law does not exist.

1. Broadcast stations serve their communities by delivering quality programming, including local news programs on which the public relies. Nearly 60 million Americans – including many low-income and minority households – rely exclusively on over-the-air broadcast signals to watch television. Many other Americans watch broadcast programming through multichannel video programming distributors (MVPDs). Over-the-air broadcasting involves substantial costs, including capital expenses, network affiliation fees, licenses for popular syndicated programs, and the personnel, equipment, and facilities needed to produce local news programs and emergency coverage.

Congress has struck a careful balance that protects the interests of broadcasters, copyright holders, MVPDs, and the public. Overriding earlier

decisions of this Court, Congress decided that cable systems may not retransmit copyrighted broadcast programs without a license, but created a compulsory licensing system to facilitate cable systems' access to broadcast programs. Separately, Congress granted broadcasters rights in their signals, including the right to negotiate with MVPDs for the ability to retransmit those signals. Together, this interlocking set of provisions assigns distinct benefits and burdens to broadcasters, MVPDs, and copyright owners.

The court of appeals' decision subverts this balance. It allows Aereo to exploit broadcasters' creative efforts and investment by retransmitting their programs and signals for a profit, without producing anything and without paying broadcasters (or other copyright owners) anything. Aereo does this through a technological gimmick, using thousands of dime-sized antennae and identical digital copies to simultaneously retransmit live television programming and signals to its paying subscribers, while claiming that these are not "public performances." As Judge Chin explained, this system clearly constitutes an unauthorized public performance under the plain text of the Copyright Act: it is a "device or process," used to transmit copyrighted television programming, *i.e.*, the "performances," to "paying strangers," *i.e.*, "the public."[2] The panel majority's view that the system is saved by its "technical details" is foreclosed by the

[2] Pet. App. 43a-44a (Chin, J. dissenting).

text of the statute and is inconsistent with its purpose and legislative history.

2. Aereo's scheme is inflicting grievous and irreparable harm on broadcasters and, more broadly, on the system of national and local broadcast television. As several courts have found, Aereo and similar schemes:

(i) seriously undermine the value of network and local advertising, the largest revenue stream supporting free, over-the-air broadcasting;

(ii) impair broadcasters' ability to negotiate for retransmission consent fees, their second-most important revenue stream;

(iii) interfere with authorized online distribution of broadcast programming, an increasingly important issue for broadcasters; and

(iv) threaten to cause a migration of popular network programming to subscription services, and present local broadcasters with difficult financial decisions with respect to costly programming on which their communities rely.

Aereo's "Rube Goldberg-like contrivance"[3] is not a technological innovation, but is instead a technologically flawed approach designed solely to circumvent the law. Aereo solves no technological problem; instead, it is merely a scheme to avoid legal obstacles to free-riding. Aereo's technology is also notably inefficient, using excessive amounts of electricity and bandwidth.

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[3] Pet. App. 40a (Chin, J., dissenting).

Aereo's wasteful free-riding stands in marked contrast to the genuine innovation being achieved within the framework of the law by services like Netflix and Hulu, as well as by broadcasters themselves. Reaffirming the role of copyright protection for free, over-the-air broadcasting will not harm innovation, which is already happening under Congress's carefully calibrated legal regime. It is Aereo's scheme that represents a step backward, both as a matter of law and technology.

ARGUMENT

I. Aereo Subverts Congress' Careful Balance Through Technological Contrivance.

A. Broadcasters Provide Important Services To Their Communities At Substantial Cost.

1. This Court has observed that "the importance of local broadcasting outlets can scarcely be exaggerated."[4] As of December 31, 2013, there were 1,388 full-power commercial television stations operating in the United States,[5] each licensed by the Federal Communications Commission (FCC) to serve the needs and interests of a particular geographic

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[4] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 177 (1968) (internal quotation mark omitted)).

[5] News Release, FCC, Broadcast Station Totals as of December 31, 2013 (Jan. 8, 2014), http://tinyurl.com/FCC12-31-13.

area.[6] Some commercial broadcast television stations are owned and operated by the network with which they are affiliated, but the majority are independently owned.[7]

The most-watched broadcast television stations make three principal forms of programming available. *First*, most of these stations obtain a significant amount of their programming from the national network with which they are affiliated, such as ABC, CBS, NBC, and FOX.[8] *Second*, stations obtain syndicated programming from content providers.[9] And *third*, stations broadcast locally-produced news, sports, public affairs, and related programming of particular interest to the station's community of license.[10]

Broadcasters' role in delivering the news is especially significant, and "[i]n many ways . . . more important than ever," according to a recent FCC

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[6] *See* FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, 28 FCC Rcd. 10,496, 10,573 (2013) [hereinafter *Video Competition Report*].

[7] *Id.* at 10,573-74.

[8] *Id.*

[9] *Id.* at 10,574.

[10] *Id.*; *see also* National Association of Broadcasters, *Broadcasters' Public Service: TV Stories*, http://tinyurl.com/TVStories (last visited February 28, 2014) (compiling examples of public service provided in broadcast news and other programming).

report.[11] "[L]ocal TV remains a top news source for Americans, with almost three out of four U.S. adults (71%) watching local television news."[12] These stations increasingly "fill the void" in investigative journalism left by changes in other media sectors.[13] And broadcast news plays an irreplaceable role in emergency situations, when the viewing public as well as law enforcement authorities rely on the wall-to-wall coverage provided by local stations.[14]

2. Local broadcasters make this programming available to the general public free of charge through over-the-air service. Approximately 22.4 million American households, accounting for nearly 60 million people, rely exclusively on over-the-air broadcast signals to watch television, including 30 percent of households with annual incomes under

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[11] Steven Waldman, FCC, The Information Needs of Communities 13 (July 2011), *available at* http://tinyurl.com/FCCWaldman.

[12] Katerina Eva Matsa, *Local TV Audiences Bounce Back*, Pew Research Center (January 28, 2014), http://tinyurl.com/PewBounceBack.

[13] Barb Palser, *A Promising New Venue: TV stations and their digital outlets may play a more prominent role in investigative reporting*, American Journalism Review, Aug. 27, 2012, http://tinyurl.com/AJRPalser.

[14] For example, the FCC and FEMA called on citizens to "[t]une in to your local television or radio stations . . . for important news alerts" related to Hurricane Sandy. Advisory, FCC, FCC Provides the Public With Important Tips for Communicating in the Aftermath of Hurricane Sandy (Oct. 31, 2012), http://tinyurl.com/FCCSandy.

$30,000.[15] In addition to lower-income families, minorities and younger adults rely heavily on free television, with minority groups making up 41% of all broadcast-only households.[16] As the FCC has noted, "[f]or many people, free, over-the-air television is their primary source of news, information and emergency alerts – not to mention entertainment."[17]

Millions more watch broadcast television stations as retransmitted – with authorization – by a cable system, satellite carrier, or other MVPD to which viewers pay a monthly fee.[18] Because the

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[15] Press Release, National Association of Broadcasters, Over-the-Air TV Renaissance Continues as Pay TV Cord-Cutting Rises (June 21, 2013), http://tinyurl.com/NABRenaissance (citing GfK Media & Entertainment, The Home Technology Monitor (2013)).

[16] *Id.*

[17] Press Release, FCC, Ten Days and Counting to DTV Transition (June 2, 2009), http://tinyurl.com/DTV10Days; *see also Rethinking the Children's Television Act for a Digital Media Age: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 7 (July 22, 2009) (Statement of Julius Genachowski, Chairman, FCC) ("Broadcast television remains an essential medium, uniquely accessible to all Americans.").

[18] About 100 million television households subscribe to an MVPD. Some households receive local television signals both over-the-air and via an MVPD for different television sets within the household. Nearly 18 million households subscribing to an MVPD service have one or more television sets unconnected to the service. *See* Comments of the National Association of Broadcasters*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, at 2 (Sept. 10, 2012), *available at* http://tinyurl.com/NABComments (citing GfK-Knowledge Networks, Home Technology Monitor, 2012 Ownership Survey and Trend Report (Spring 2012/Mar. 2012)).

most popular local and national television programs appear on broadcast stations, MVPDs are willing to pay for the right to retransmit popular stations.[19]

3. Bringing top-quality national and local programming to the public entails significant costs for broadcasters. Local stations face substantial capital expenses for their transmission facilities and invest heavily in innovation.[20] They pay network

[19] *See Video Competition Report*, 28 FCC Rcd. at 10,521-23. MVPDs routinely label top broadcast programming as "must-have" in their advocacy before the FCC. *See* Joint Reply Comments of Broadcasters, *Amendment to the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, at 6 & n.27 (June 27, 2011), *available at* http://tinyurl.com/RetransComments; *see also* TVB, TV Basics 11 (June 2012), http://tinyurl.com/TVBasics (broadcasters aired 96 of the top 100 most-watched programs in 2011-12).

[20] For example, local stations each spent millions to convert to digital transmissions. *See* Comments of the National Association of Broadcasters, *Quadrennial Regulatory Review*, FCC MB Docket No. 06-121 at 90-91 (Oct. 23, 2006) (stations reported spending $3-4 million on digital transmitters and towers, and greater amounts on replacing production equipment and other infrastructure). Since the completion of the digital TV transition in 2009, "stations have aggressively expanded their programming options into multiple secondary channels and now mobile channels that can be received in the home, in the car and on the move." Justin Nielson, *TV Stations Multiplatform Analysis '12 Update: New Digital Networks, Mobile TV Channels Expand Content Options*, SNL Kagan (Jan. 31, 2012), http://tinyurl.com/SNLK-12Update. As of January 2012, the 1,726 full-power digital TV stations (both commercial and noncommercial) were offering a total of 4,552 free over-the-air broadcast channels, including multicast channels, many of which offer new networks and other programming targeting minority, foreign language and other audiences. *Id*. In addition, over 82 percent of digital full-power TV stations were airing programming in high definition, and station owners continued to invest in their websites and mobile apps. *Id*.

affiliation fees and other compensation to acquire exclusive rights to popular network programming in their local markets, as well as licensing fees to acquire exclusive local rights to syndicated programming.[21] Broadcasters may pay syndication fees of up to $2.5 million in barter and cash for a single episode of top shows such as *Modern Family* and *The Big Bang Theory*.[22] Stations also incur significant costs to produce local programming, including hiring reporters and camera crews, purchasing news vans and other equipment, and maintaining production facilities. A survey of television stations reported that, on average, they spend over $4 million per year in their news operating budgets and over $700,000 in their news capital budgets.[23] Finally, stations provide expensive-to-produce news coverage on which the public depends, such as commercial-free reporting during times of emergency.[24]

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[21] *Video Competition Report*, 28 FCC Rcd. at 10,587-88, 10,599.

[22] *Id.* at 10,588.

[23] *See* Comments of the National Association of Broadcasters, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC GN Docket No. 10-25, at 5-6, 33 (May 7, 2010), *available at* http://tinyurl.com/FutureNewMedia.

[24] *See id.* at 16 (reporting that a single season's hurricane coverage cost one local station $160,000 even before accounting for lost advertising revenue).

B. Congress Has Struck A Balance To Protect Local Broadcasters, MVPDs, Copyright Holders, And Ultimately, The Public.

Broadcast television is available for free over the air to viewers; it is not and could not be free to all entities for all purposes. Like any business, commercial television broadcasters would suffer devastating harm if other commercial enterprises could appropriate their product freely and without compensation. Congress has crafted a comprehensive statutory scheme to ensure that this does not happen.

The right to authorize public performances of a copyrighted audiovisual work is an exclusive right secured to copyright holders.[25] Prior to 1976, this Court had held that retransmissions of broadcast programming by cable systems were not "performances" of that programming, allowing cable systems to retransmit broadcast television for free.[26] Congress concluded that these decisions posed a serious threat to the broadcast industry and abrogated them in the Copyright Act of 1976.[27] As the legislative history confirms, Congress determined that a "commercial enterprise[]" – like Aereo – "whose basic retransmission operations are based on

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[25] 17 U.S.C. § 106(4).

[26] *See Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

[27] Pub. L. No. 94-553, 90 Stat. 2541; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-10 (1984).

the carriage of copyrighted program material" – again, like Aereo – should pay "copyright royalties" to the "creators of such programs."[28]

At the same time, Congress was concerned that individual negotiations with every copyright owner would be "impractical and unduly burdensome."[29] It therefore created a narrowly tailored compulsory licensing regime, *not* universally applicable, but limited to cable operators and later satellite providers.[30] Thus, Congress struck a balance: copyright holders receive robust protection that applies to retransmission of broadcast programming, but select entities – cable and satellite systems – are granted a streamlined licensing mechanism.[31]

Distinct from the copyright interests in broadcast programming, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992,[32] and the Satellite Home Viewer

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[28] H.R. Rep. No. 94-1476, at 89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704.

[29] *Capital Cities Cable, Inc.*, 467 U.S. at 709 (quoting H.R. Rep. No. 94-1476, at 89).

[30] *See id.*; 17 U.S.C. §§ 119, 122. In determining to "act as narrowly as possible," Congress highlighted the importance of not derogating from the "property rights" of copyright holders more than necessary. S. Rep. No. 106-42, at 10 (1999).

[31] These congressionally-created compulsory licenses also include conditions on MVPDs, violation of which results in full copyright liability. *See* 17 U.S.C. § 111(c)(2)-(4); 17 U.S.C. § 119(a)(4)-(7); 17 U.S.C. § 122(d)-(f).

[32] Pub. L. No. 102-385, 106 Stat. 1460.

Improvement Act of 1999.[33] These statutes created a separate right for broadcasters in their signals and allowed commercial television stations to bargain regarding the right of MVPDs to retransmit those signals.[34]

Together, these interlocking statutory provisions strike a careful balance designed to serve the public interest:

- *Over-the-Air Broadcasts*: Each local broadcast station receives a license from the FCC to transmit program services on a particular frequency, and is required to operate the station in a manner that serves the public interest.

- *MVPDs and Retransmission Consent*: Local commercial broadcast stations have control over retransmission of their signals by MVPDs. Because of the demand for the mix of programming they make available,[35] network-affiliated television stations typically negotiate compensation from MVPDs for the right to

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[33] Pub. L. No. 106-113, 113 Stat. 1501.

[34] *See* 47 U.S.C. § 325(b)(1).

[35] *See* Reply Comments of the National Association of Broadcasters, *Amendment of the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, Ex. A., Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves, at 15 n.28 (June 27, 2011), *available at* http://tinyurl.com/EisenachCaves.

deliver the broadcast signal to subscribers ("retransmission consent").[36]

- *Copyright Owners*: Copyright holders authorize broadcasters to publicly perform their works over the air, but this permission does not necessarily carry over to other platforms. Only cable systems and satellite carriers may bypass direct negotiations with rights holders through a statutory compulsory licensing system; other would-be retransmitters must obtain individualized consent.[37]

C. Aereo's "Rube Goldberg-Like Contrivance" Violates The Plain Text Of The Copyright Act and Circumvents Its Purpose.

Unauthorized streaming of copyrighted programming to the public over the Internet is illegal.[38] To its subscribers, Aereo functions just like

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[36] *See Video Competition Report*, 28 FCC Rcd. at 10,521.

[37] *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278-87 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013). *ivi* held that an online service that streamed live, copyrighted broadcast programming without consent could be held liable for publicly performing such programming. As Judge Chin recognized, the litany of harms the Second Circuit identified with respect to ivi "appl[ies] with equal force" to Aereo. Pet. App. 57a (Chin, J. dissenting).

[38] *See, e.g.*, *ivi*, 691 F.3d at 275; *Warner Bros. Entm't, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011); Stipulated Consent Judgment and Permanent Injunction, *CBS Broad. Inc. v. FilmOn.com, Inc.*, 10-cv-7532-NRB (S.D.N.Y. Aug. 9, 2012), ECF No. 49; *Twentieth Century Fox Film Corp. v.* (continued…)

the indisputably infringing services that came before it. Aereo, however, claims it is different because it employs a convoluted technological ruse: in making live television programs available to its subscribers, it claims to use "thousands of individual dime-sized antennas" to make identical "unique copies" that it then transmits simultaneously to as many subscribers. This "Rube Goldberg-like contrivance, over-engineered . . . to take advantage of a perceived loophole in the law," does not change the basic fact that Aereo is "publicly performing" copyrighted works in violation of the Copyright Act.[39]

The exclusive right to "perform the copyrighted work publicly" includes the right to "transmit or otherwise communicate a performance . . . to the public, by means of any device or process" (the "Transmit Clause").[40] The expansive language of the Transmit Clause makes clear that a performance is public "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate

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ICraveTV, Nos. Civ.A. 00-120, Civ.A. 00-121, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000); *see also Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Prop., Competition and the Internet of the H. Comm. on the Judiciary,* 112th Cong. 6, 11 (2011) (statement of Maria A. Pallante, Register of Copyrights) ("As streaming becomes an increasingly popular means of accessing creative works . . . , it will continue to be attractive to infringers. Unfortunately, the problem of unauthorized streaming is here to stay.").

[39] Pet. App. 40a (Chin, J., dissenting).

[40] 17 U.S.C. § 101.

places, and at the same time or at different times."[41] As Judge Chin explained, Aereo fits squarely within the statute: its "system of thousands of antennas" is a "device or process," and it uses that system to transmit copyrighted television programming, *i.e.*, the "performances," to "paying strangers," *i.e.*, "the public."[42] This common-sense interpretation is also supported by the legislative history of the Copyright Act of 1976, which explains that Congress intended to cover "all conceivable forms and combinations of wired or wireless communications media," in order to anticipate future technological developments.[43]

The court below incorrectly reasoned that the "technical details" of Aereo's system allow it to thwart this straightforward application of the law.[44] According to the majority, the Transmit Clause applies only if "'a *particular transmission of a performance*'" can be received by the public; each "transmission sent by Aereo" to its subscribers is "generated from [a] unique copy" of the television program, so that copy is not transmitted to "the public."[45] But the Act says nothing about whether the underlying "performance" is "transmitted" to "the public" using one copy or multiple (technologically unnecessary) copies. To the contrary, the Transmit

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[41] *Id.*

[42] Pet. App. 43a-44a (Chin, J., dissenting).

[43] H.R. Rep. No. 94-1476, at 64.

[44] Pet. App. 33a.

[45] Pet. App. 18a (quoting *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 135 (2d Cir. 2008) ("*Cablevision*")).

Clause "does not use the terms 'copy' or 'copies'" at all.[46] Instead, in language that is remarkable for its comprehensiveness and breadth, the statute applies to "*any* device or process," without regard to whether the underlying work (*i.e.*, the "performance") is transmitted to members of the public "in separate places" or "at different times." The lower court has simply and improperly rewritten the Transmit Clause to replace "performance" with "transmission." Only by departing from the statutory text could the panel conclude that Aereo's "technical details" save it.

Beyond its lack of textual justification, Aereo's contrivance plainly subverts the balance Congress struck. Like broadcasters, Aereo transmits programming to the public. But unlike broadcasters, it pays nothing for that programming and has no duty to serve the public. Like MVPDs, Aereo re-transmits broadcast signals and profits from charging monthly subscription fees to viewers.[47] But unlike MVPDs, it does not negotiate with rights

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[46] Pet. App. 146a (Chin, J., dissenting from denial of reh'g en banc).

[47] In this respect, Aereo's commercial retransmission service is not remotely similar to an individual viewer recording copyrighted programming for personal viewing at a later time, or even to a retailer whose products can be used by others for that purpose. *Cf. Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Analogizing the actions of a for-profit retransmitter to those of an individual viewer was the exact approach Congress rejected when it abrogated *Teleprompter Corp.* and *Fortnightly Corp.* Likewise, Aereo's service does not resemble a remote storage DVR service offered by a *licensed* provider, as in *Cablevision*.

holders, pay any fees, or comply with any of the statutory conditions Congress imposed upon MVPDs.[48] Like copyright holders, Aereo profits from valuable programming. But unlike copyright holders, it does none of the innovation, supplies none of the creativity, and contributes none of the financial investment. This is not a legitimate function contemplated by Congress's carefully calibrated regime; it is simply free-riding.

II. Aereo's Illegal And Inefficient Scheme Inflicts Serious Harm On The Public.

A. Aereo Undermines Broadcasters' Ability To Deliver Free And Innovative Programming.

In subverting the careful balance Congress has struck, Aereo inflicts grievous – and, as several courts have found, irreparable[49] – harm on

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[48] In addition to payment of fees, these conditions include compliance with certain FCC rules, reporting requirements, prohibitions against alterations in programs, and prohibitions or other limitations against the importation of distant signals into a broadcast station's local market. *See supra* note 31.

[49] *Cmty. Television of Utah v. Aereo, Inc.*, No. 2:13CV910, 2014 WL 642828, at *8 (Feb. 19, 2014 D. Utah) (identifying several categories of irreparable harm broadcasters will suffer without a preliminary injunction against Aereo); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758, 2013 WL 4763414, at *15-17 (D.D.C. Sept. 5, 2013) (same with respect to a nearly identical service); *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012) (same). Even the district court in this case agreed that broadcasters would suffer irreparable harm in the absence of an injunction. Pet. App. 109a-116a.

broadcasters. The harm faced by local stations points to a broader harm to the system of national and local broadcast television service that has long benefited the public.

1. Aereo's technological contrivance undermines the largest revenue stream supporting free, over-the-air television: advertising. Aereo audiences are "not measured by Nielsen" ratings, meaning broadcasters cannot command advertising revenues commensurate with their viewership.[50] Since 88 percent of broadcast revenue is derived from advertising, even small differences in ratings points can have a huge financial impact on local stations.[51]

Aereo and services like it may further diminish advertising revenues by diverting viewers out of their local markets. Aereo's purported controls against out-of-market viewing are illusory – customers are invited to watch programming from any available market so long as they click a button that says, "I swear, I am in market."[52] More fundamentally, the Second Circuit's reasoning allows

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[50] Pet. App. 110a. The industry "relies on [the] Nielsen [Company's] data to measure broadcast television station audiences" and thereby determine advertising rates. *Video Competition Report*, 28 FCC Rcd. at 10,592.

[51] *See id.* at 10,583.

[52] Decl. of Dr. John P.J. Kelly ¶¶ 74-75, *Am. Broad. Cos., Inc. v. Aereo, Inc.* (S.D.N.Y. Apr. 30, 2012) (reproduced in the joint appendix before the Second Circuit at A-1838). By clicking the "in market" button, the viewer is invited to state that she is located within the authorized viewing area for the station in question, even if she is actually outside that area.

Aereo and its sister services to offer streaming of out-of-market stations. If an unauthorized streaming service allows Californians to watch New York programs – three hours early, and with commercials for New York car dealerships instead of California dealerships – it would further "reduce the value of . . . local advertisements."[53] Enabling this viewing of out-of-market television stations would also destroy local stations' bargained-for program exclusivity rights. These are the very harms Congress sought to prevent in significantly restricting, and in some cases prohibiting outright, the importation of out-of-market stations.[54]

2. Aereo also directly jeopardizes retransmission consent fees, broadcasters' second-most important revenue stream. These fees represent a "substantial and growing revenue source for the television programming industry."[55] The threat to this revenue comes not only from Aereo, which retransmits broadcast signals for profit without paying these fees; large MVPDs are already exploring ways to take advantage of a legal regime in

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[53] *ivi*, 691 F.3d at 286.

[54] *See* 17 U.S.C. § 111(c)(1) (requiring cable systems to comply with FCC rules, including those enforcing limitations on the importation of distant signals); 47 C.F.R. §§ 76.92, 76.101, 76.120; *see also* 17 U.S.C. § 119(a)(6) (restricting "violations of territorial restrictions" by satellite carriers).

[55] *ivi*, 691 F.3d at 285; *see also Video Competition Report*, 28 FCC Rcd. at 10,599-600 (retransmission consent fees represent $2.36 billion in broadcast station industry revenues in 2012, up from $1.76 billion in 2011).

which paying for signals is apparently optional.[56] Aereo's very existence gives cable companies "leverage to negotiate deals with broadcasters on more favorable terms."[57] The fundamental economics of broadcast television are already being undermined by the need to bargain in the shadow of the Aereo threat.

3. Aereo is also undermining broadcasters' negotiating position with respect to authorized online distribution. Ensuring that broadcasters have the exclusive "first run" of popular programming ahead of Internet sources is an important point of negotiation between broadcast television stations and their programming suppliers, including the networks with which they are affiliated.[58] "[N]egotiated Internet retransmissions – for example, on Hulu.com – typically delay Internet broadcasts so as not to disrupt plaintiffs' broadcast distribution models, reduce the live broadcast audience, or divert the live broadcast audience to the

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[56] *See* Andy Fixmer et al., *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, Bloomberg, Oct. 26, 2013, http://tinyurl.com/DirecTVAereo ("DirecTV, Time Warner Cable Inc. (TWC) and Charter Communications Inc. (CHTR), taking a page from Aereo Inc., are considering capturing free broadcast-TV signals to avoid paying billions of dollars in so-called retransmission fees."); Shalini Ramachandran, *TV Service Providers Held Talks With Aereo*, Wall St. J., Apr. 1, 2013, at B1 (reporting that Aereo has discussed partnerships with major pay-TV distributors, including AT&T and DISH Network).

[57] Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, FierceCable, Apr. 26, 2012, http://tinyurl.com/BrittAereo.

[58] *See Video Competition Report*, 28 FCC Rcd. at 10,607-10.

Internet."[59] Aereo subverts the carefully negotiated balance between first-run live broadcasts and authorized Internet viewing.

4. In combination, the harms described above will reduce broadcasters' ability to continue offering costly and diverse national and local programming free over-the-air. Aereo's free riding creates a substantial danger that quality programming will migrate from broadcast television to pay services.[60] Local broadcasters will also face difficult choices. As entities licensed to serve their local communities, broadcasters strive to avoid scaling back programming on which the public depends. However, with both advertising and retransmission consent revenues jeopardized, expensive-to-produce local news coverage, such as wall-to-wall emergency reporting, faces clear financial challenges.[61] All of

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[59] *ivi*, 691 F.3d at 285.

[60] For example, in the wake of the Second Circuit's decision, News Corp. President and COO Chase Carey stated that FOX may convert to a subscription-only model, explaining that "[w]e simply cannot provide the type of quality sports, news, and entertainment content that we do from an ad supported only business model." Ira Teinowitz, *FOX-Aereo Dispute Could Force Network Off Broadcast TV, Says Chase Carey*, The Wrap, Apr. 8, 2013, http://tinyurl.com/CareyAereo. Executives at CBS and Univision have echoed these sentiments. Brian Stetler, *Broadcasters Circle Wagons Against A TV Streaming Upstart*, N.Y. Times, Apr. 9, 2013, http://tinyurl.com/CBSAereo. Sports leagues may also move popular content from over-the-air broadcasts to cable networks such as ESPN. *See* Brief of National Football League and Major League Baseball As *Amici Curiae* In Support Of Petitioners at 14, *Am. Broad. Cos. v. Aereo, Inc.* (No. 13-461) (certiorari-stage).

[61] *See supra* Part I.A.3.

these costs are real and immediate, and their confluence "threaten[s] to destabilize the entire industry"[62] – an industry that provides a valuable service for free to millions of Americans.

B. Aereo's System Does Not Represent Technological Innovation, But Is Rather A Flawed And Inefficient Tool For Circumventing The Law.

Some previous copyright cases have involved a balance between "supporting creative pursuits through copyright protection" on the one hand, and promoting "technological innovation" on the other.[63] This is not such a case. Aereo's free-riding scheme is deliberately wasteful and inefficient; it is "innovative" only in the realm of legal artifice, not in the realm of technological progress. It is broadcasters and *authorized* retransmitters who are making societally beneficial innovations within the framework of the copyright laws and the comprehensive legal architecture that Congress has erected.

Aereo does not solve any technological problem; it only aims to "solve" a legal obstacle that would otherwise prevent its free-riding scheme. Far from benefiting society, this law-office innovation is tremendously inefficient. Aereo's convoluted "technology" requires disproportionate consumption

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[62] *ivi*, 691 F.3d at 286.

[63] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005).

of electricity, demanding enough power in New York alone to light two football stadiums.[64] Aereo also requires considerable bandwidth for its inefficient operations, and has recently confronted problems in various markets related to unspecified "capacity" issues.[65] This prodigious consumption of resources serves no technological purpose. In fact, Aereo appears to deliver a product that is technologically inferior to the legitimate services it seeks to displace.[66]

Aereo's wastefulness stands in marked contrast to the genuine innovation being achieved within the framework of the law. Services like Netflix and Hulu, which *lawfully* acquire the rights to deliver copyrighted programs over the Internet, deliver vastly more content than Aereo at a lower price to subscribers.[67] Broadcasters themselves, in addition to their continued innovation in programming, also devote considerable effort to innovation in content delivery, including the live

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[64] Shalini Ramachandran & Amol Sharma, *Electricity Use Impedes Aereo's March*, Wall St. J., Oct. 28, 2013, http://tinyurl.com/AereoElec.

[65] Mari Silbey, *Aereo Hits Capacity Crunch Again*, LightReading, Feb. 5, 2014, http://tinyurl.com/AereoCrunch.

[66] *See* Dwight Silverman, *Aereo Update: A Case Of Lowered Expectations*, The Houston Chronicle, Oct. 10, 2013, http://tinyurl.com/AereoLowerExpectation (noting technological glitches).

[67] Farhad Manjoo, *Don't Root for Aereo, the World's Most Ridiculous Start-up*, PandoDaily, July 14, 2012, http://tinyurl.com/ManjooAereo.

streaming of their station signals and content over the Internet.[68]

Reaffirming the role of copyright protection as a pillar of the free, over-the-air broadcast model will not harm technological innovation. That innovation can and will happen – and is already happening – in lawful ways pursuant to Congress's carefully calibrated regime. Aereo's scheme, by contrast, is a step backward not just as a matter of law but as a matter of technology as well.

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[68] Kevin Downey, *NBC Set For Spring TV Everywhere Launch*, TVNewsCheck, Jan. 28, 2014, http://tinyurl.com/TVEverywhereLaunch; Ronald Grover, *Disney's ABC To Start First Streaming Of Live Broadcast Shows*, Reuters, May 12, 2013, http://tinyurl.com/ReutersABCStream; Amol Sharma, *CBS Buys Stake in TV-Streaming Firm*, Wall St. J., Apr. 22, 2013, http://tinyurl.com/CBSSyncbak; *see also* Andrew Dodson, *TV Readies For Live Streaming Realities*, NetNewsCheck, June 26, 2013, http://tinyurl.com/LiveStreamRealities (noting that "[i]t's not just major networks investing in streaming solutions," and pointing to efforts "to bring streaming technology to local stations").

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioners' brief, the decision of the court of appeals should be reversed.

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