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 WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. N.W.
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

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QUESTION PRESENTED

Whether, under the 1976 Copyright Act, 17 U.S.C. § 106(4), a company "publicly performs" a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.

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INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. In particular, WLF has regularly appeared as *amicus curiae* before this Court and numerous other federal and state courts in support of protecting the property rights of owners, including owners of intellectual property. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *UMG Recordings Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (2d Cir. 2013).

In addition, WLF's Legal Studies Division frequently publishes articles and sponsors media briefings on a variety of intellectual property issues, including issues arising from federal copyright law. *See, e.g.,* Ben Sheffner, Sony v. Tenenbaum: *There are Limits to Fair Use Defense In Copyright Infringement Cases* (WLF Legal Opinion Paper, Oct. 9, 2009); Ronald A. Cass, *Liberty and Property: Human Rights and the Protection of Intellectual Property* (WLF Working Paper, Jan. 2009); *Copyrights in Cyberspace: Are Intellectual Property Rights Obsolete in the Digital Economy?* (WLF Media

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; blanket letters of consent have been lodged with the Clerk.

Briefing, Mar. 28, 2001).

This case has vitally important implications for all copyright holders, performing artists, and producers of original content. WLF has long supported a legal regime of robust copyright protection to encourage and reward the creativity and genius that are so essential for the free market to flourish. WLF is deeply troubled, however, by the Second Circuit's decision in this case, which threatens the continued viability of the Copyright Act by legitimizing business models based entirely on the unauthorized, for-profit exploitation of the copyrighted works of others. If that decision is allowed to stand, copycat services are sure to follow the Second Circuit's blueprint for circumventing the longstanding protections afforded by federal copyright law. Only reversal by this Court can restore the Copyright Act's vital protections.

As *amicus curiae*, WLF believes that the arguments set forth in this brief will assist the Court in evaluating the issues presented by the Petition. WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, fosters and protects intellectual creativity by granting exclusive rights to copyright holders in their expressive works. Among those protections is the exclusive right "to perform the copyrighted work

publicly." *Id.* §106(4). In establishing the scope of protection afforded by this exclusive right of "public performance," Congress provided an expansive definition of "perform," which includes "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.* §101. Equally expansive, to "publicly" perform or display a work under the Act means "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.*

Petitioners create, produce, distribute, market, and transmit original broadcast television programming for which they own the copyrights. Using an elaborate network of thousands of tiny antennae, Respondent Aereo captures over-the-air television broadcasts and retransmits them over the Internet to subscribers. Pet. App. 2a-6a. A subscriber logging onto Aereo to watch a program is temporarily assigned an antenna, which feeds the requested broadcast signal to a computer system that transcodes the data. Aereo then sends that data to a server, which creates a copy of the program in real time and saves it to an individualized hard drive directory. *Id.* at 7a-8a. If the subscriber elects to view the broadcast live, Aereo streams it over the Internet from the hard-drive copy with a delayed buffer of only six or seven seconds. *Id.*

Because Aereo routinely profits from the unauthorized retransmission of Petitioners' programming without providing compensation, Petitioners sued Aereo for copyright infringement in the Southern District of New York alleging, among other things, that Aereo's retransmission of Petitioners' "live" television programming over the Internet violated their rights of public performance and reproduction under 17 U.S.C. §106. *See* Pet. App. 60a-61a. Specifically, Petitioners claimed that Aereo's multiple retransmissions of copyrighted broadcast performances were each received by a particular member of the public "in separate places and . . . at separate times" under 17 U.S.C. §101. Accordingly, Petitioners sought a preliminary injunction barring Aereo from transmitting Petitioners' television programming over the Internet to Aereo's subscribers while Petitioners' programs are still being broadcast. *Id.*

Following expedited briefing and discovery, the district court held a two-day evidentiary hearing, after which it considered Petitioners' motion for preliminary injunction. The district court concluded that Petitioners' likelihood of success on the merits was precluded by the Second Circuit's binding precedent in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"). Pet. App. 59a-60a ("But for *Cablevision*'s express holding regarding the meaning of . . . the transmit clause . . . Plaintiffs would likely prevail on their request for a preliminary injunction."). Finding that Aereo's system was substantially similar to the remote-storage digital video recorder (RS-DVR) system held not to infringe copyright plaintiffs' public-performance rights in

Cablevision, the district court denied Petitioners' motion for preliminary injunction. Petitioners promptly filed an interlocutory appeal to the U.S. Court of Appeals for the Second Circuit. *Id.* at 60a.

A divided panel of the Second Circuit affirmed. Pet. App. 2a. Agreeing with the district court that *Cablevision* foreclosed Petitioner's infringement claims, the panel majority reasoned that, as in *Cablevision*, when an Aereo subscriber selects a program, Aereo creates a unique copy of that program on a designated portion of a hard drive assigned only to the subscriber. When the Aereo subscriber then views the recorded program, "the transmission sent by Aereo and received by that user is generated from that unique copy." *Id.* at 23a. Therefore, the appeals court reasoned, "just as in *Cablevision*, the potential audience of each Aereo transmission is the single user who requested that a program be recorded." *Id.* According to the Second Circuit, "the relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted." *Id.* at 25a-26a. Because every Aereo subscriber receives an individualized transmission from a unique subscriber-associated digital copy of the same broadcast, Aereo's simultaneous transmission to thousands of subscribers is rendered "private." The Second Circuit conceded, however, that such a "focus on the potential audience of each particular transmission would render superfluous the 'different times' language from the statute." *Id.* at 21a n.11.

Judge Chin dissented, colorfully criticizing Aereo's "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. Regardless of *Cablevision*'s holding, Judge Chin concluded, by retransmitting copyrighted programming to the public without authorization, Aereo was engaged in "copyright infringement in clear violation of the Copyright Act." *Id.* at 39a.

Petitioners unsuccessfully sought rehearing *en banc*. Judge Chin, joined by Judge Wesley, vigorously dissented from the denial of rehearing. Pet. App. 128a-155a. Noting that "the panel majority's decision has already had a significant impact on the entertainment industry," *id.* at 130a, Judge Chin explained why "[u]nder any reasonable construction of the statute, Aereo is performing the broadcasts publicly as it is transmitting copyrighted works 'to the public.'" *Id.* at 136a-37a. Consequently, Judge Chin insisted, the panel's opinion could not be squared with either the plain language of the Copyright Act or with Congress's intent.

Judge Chin went on to criticize the Second Circuit's reasoning in *Cablevision* itself, which in his view "conflated the phrase 'performance or display' with the term 'transmission,' shifting the focus of the inquiry from whether the transmitter's audience receives the same content to whether it receives the same transmission." Pet. App. 142a. But under the statute, he explained, the public need only be "capable of receiving the *performance or display*, not the *transmission*." *Id.* at 144a (emphasis in original). By placing such undue emphasis on the cleverness of

Aereo's technology, the panel failed to recognize that Aereo's elaborate network of tiny antennae and unique copies were simply a "device or process" for transmitting copyrighted broadcasts to the public without permission. *Id.* 149a-51a.

SUMMARY OF ARGUMENT

The exclusive right of "public performance" is among the most critically important and economically significant rights that federal law grants to copyright holders. It is undisputed that Respondent Aereo retransmits over the Internet, for profit and without permission, copyrighted programming to its subscribers while that programming is still being broadcast live over the airwaves. In the Copyright Act, Congress made it clear that such an unauthorized public performance is infringing "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101. So long as the performance or display is capable of reaching members of the public, copyright liability attaches.

The Second Circuit's holding in this case threatens to eviscerate the public-performance right, by holding that the relevant inquiry "is the potential audience of a particular *transmission*, not the potential audience for the underlying work or the particular performance of that work being transmitted." Pet. App. 25a-26a (emphasis added). In other words, because every Aereo subscriber receives an individual transmission from a unique subscriber-associated digital copy of the same

performance, no violation occurs. But neither the plain text nor the legislative history of the Copyright Act offers any support for such an interpretation. Indeed, the Second Circuit's unprincipled approach to copyright liability is completely untethered from the statute, which nowhere suggests that the "uniqueness" of the copies used somehow immunizes from copyright liability the unauthorized transmission of a "performance" to the "public."

The holding below is also an unwarranted extension of the Second Circuit's analytically flawed and factually limited *Cablevision* case, which immunized a remote cable operator's RS-DVR from public performance liability. *Cablevision*'s interpretation of the Copyright Act's public-performance right has been widely criticized as legally untenable and in serious conflict with the statute Congress actually crafted. Nevertheless, even if it remains binding precedent in the Second Circuit, the *Cablevision* panel expressly limited its public performance holding to RS-DVRs, insisting that its limited holding does not provide a blueprint for services to circumvent the public-performance right through technological cleverness.

Finally, the decision below, if allowed to stand, will have drastic, far-reaching consequences not only for the broadcast entertainment industry, but for members of the viewing public who benefit from the creative work that will be deterred. The Second Circuit's judicial gutting of copyright holders' exclusive public-performance right severely distorts a well-defined marketplace and upends settled expectations among the affected stakeholders. As Aereo expands the reach of its operations, copycat

services will follow suit. Broadcasters increasingly will have little incentive to continue creating and producing programming for which they cannot be compensated through retransmission fees. At the same time, entities such as Aereo are designed to lure viewers away from original broadcasts tracked by Nielsen ratings—a vital source of advertising revenue for broadcasters. But if broadcast television cannot remain profitable, the general public who has come to rely on it for education and enjoyment will be made to suffer. Only reversal by this Court can vindicate the important interests at stake in this case.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE COPYRIGHT ACT

This Court has previously warned that "[t]he promise of copyright would be an empty one if it could be avoided" by nothing more than a creative legal argument. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 557 (1985). But the Second Circuit's creative approach in this case gives an unusually narrow and idiosyncratic reading to an exclusive property right to which Congress gave a broad and flexible scope. Although Congress could not have anticipated every sweeping technological change that would confront the broadcast entertainment industry, the plain text and legislative history of the Copyright Act reveal that Congress was well aware of the future dangers posed by cutting-edge efforts to infringe copyrighted works.

Of course, Congress enacted the 1976 Copyright Act in direct response to this Court's holding in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), which held that a community antenna television (CATV) system's retransmission of broadcast programming to cable viewers located in remote areas did not infringe the public-performance right under the original 1909 Copyright Act. In the wake of *Fortnightly*, Congress decided it did not want copyright protection to hinge on the minute technical details of any given transmission, and so it included a series of broad definitions in the new law designed to ensure that the public-performance right encompassed virtually any retransmission of a broadcast performance.

Nothing in the Copyright Act suggests that a commercial entity that profits by retransmitting copyrighted material to the public may avoid liability for infringement of the copyright holder's exclusive right to public performance. In crafting the 1976 statute, Congress determined that a broad, flexible law was necessary to ensure that copyrighted works remain fully protected, regardless of the technological gamesmanship of any future innovation. Congress chose to provide copyright holders with exclusive rights that apply across all delivery methods, to better ensure that the nation's copyright system could withstand any future developments in technological innovation. Indeed, the very robustness of the public-performance right ensures that the Copyright Act captures even technologically clever attempts to circumvent the protections of exclusive rights.

The Act's exclusive public-performance right hinges on whether "members of the public" are "capable of receiving the performance" of a copyrighted work. 17 U.S.C. § 101. In establishing the scope of protection afforded by this exclusive right of "public performance," Congress provided an expansive definition of "perform," which includes "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.* § 101. Equally expansive, to "publicly" perform or display a work under the Act means "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.* Likewise, the Act defines a "device or process" to include "any device or process whereby images or sounds are received beyond the place from which they are sent," whether "now known *or later developed*." *Id.* (emphasis added).

The Act's legislative history further underscores Congress's strong desire for flexibility in the law's enforcement and application. Even back in 1976, Congress understood that "a cable television system is performing when it retransmits the broadcast to its subscribers." H.R. Rep. 94-1476, at 63 (1976). Congress embraced the "traditional" interpretation of copyright law "under which public communication by means other than a home receiving set, or further transmission of a broadcast

to the public, is considered an infringing act." *Id.* at 87. More emphatically, Congress intended that "[e]ach and every method by which the images or sounds comprising a performance . . . are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in any form, that case comes within the scope" of the public-performance right. *Id.* at 64. Leaving no room for ambiguity, the legislative history goes even further, acknowledging that a "performance" may be accomplished by "any other techniques and systems *not yet in use or even invented*." *Id.* at 63 (emphasis added).

The Second Circuit's approach to the public-performance right runs roughshod over the plain text and legislative history of the Copyright Act. In particular, it ignores the statute's express language clarifying 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 places and at the same time or at different times." 17 U.S.C. § 101. The Second Circuit admits as much, conceding that its "focus on the potential audience of each particular transmission would essentially read out the 'different times' language" from the Copyright Act. Pet. App. 21a n.11. And it ignores altogether the fact that Congress crafted the statute in such a way that it would not be vulnerable to being undermined by any future technological innovation.

To vindicate both the letter and the purpose of the Copyright Act, the Court should reverse the decision below.

II. *CABLEVISION* SHOULD NOT DICTATE THE RESULT IN THIS CASE

A. The *Cablevision* Court Misconstrued The Copyright Act's Public-Performance Right

The panel majority agreed with the district court that the Second Circuit's earlier holding in *Cablevision* mandated the outcome in this case. But leading copyright scholars argue that *Cablevision* misconstrued the Copyright Act's right of public performance and that the *Cablevision* court's reasoning could have a detrimental impact on the creative arts community. *See, e.g.,* 2 Paul Goldstein, *Goldstein on Copyright*, § 7.7.2, at 7:168.1 (3d ed. 2011 Supp.) ("*Cablevision* effectively closed off a critical aspect of the transmit clause's intended embrace."); Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?* Colum. Pub. L. & Legal Theory Working Papers, No. 08158 (2008) ("[T]he Second Circuit's recent decision in *Cartoon Networks v. CSC Holdings*, if followed, could substantially eviscerate the reproduction and public performance rights.").

As critics have repeatedly pointed out, *Cablevision* mistakenly focused on who is capable of receiving "a particular transmission of a performance" rather than who is capable of receiving "the performance being transmitted" (as § 101 of the Copyright Act actually requires). *See, e.g.,* Raymond T. Nimmer, *Law of Computer Technology* § 15:6 (2013) (stating that the *Cablevision* court took "a restrictive view of the case that combined an emphasis on the technology Cablevision used with

an apparent desire to enable cable entities to control this type of delayed viewing.").

In reaching its result, *Cablevision* also overlooked the fact that a work can be publicly performed in ways other than from a single copy (such as in this case, where thousands of copies are made). Building on this fundamental error, the panel below held that "the creation of user-associated copies . . . under *Cablevision* means that Aereo's transmissions are not public." Pet. App. 31a. Under this view, "technical architecture matters," *id.* at 33a, even when the governing statute provides exactly the opposite.

Ironically, *Cablevision* itself emphasized that its holding did not provide a blueprint for future services to perform an end-run around the public performance right, stating that "[t]his holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies." 536 F.3d at 139.

When then-Solicitor-General Elena Kagan opposed certiorari in *Cablevision*, she acknowledged that "some aspects of the Second Circuit's reasoning on the public-performance issue are problematic," observing:

> Some language in the court of appeals' opinion could be read to suggest that a performance is not made available "to the public" unless more

> than one person is capable of receiving a *particular* transmission. . . . Such a construction could threaten to undermine copyright protection in circumstances far beyond those presented here, including with respect to [video-on-demand] services or situations in which a party streams copyrighted material on an individualized basis over the Internet.

Brief for the United States as *Amicus Curiae*, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) *(No. 08-448),* 2009 WL 1511740, at *20-21 (emphasis in original). In recommending against review, then-Solicitor-General Kagan took the Second Circuit at its word that the copyright owners need not be worried because the *Cablevision* holding was expressly limited to its own facts. As she explained, "[t]he Second Circuit simply resolved a narrow question about a discrete technology in the terms that it had been framed by the parties" and "was careful to tie its actual holdings to the facts of this case." *Id.* at *19, *6.

Unfortunately, the panel majority's reliance on *Cablevision* in this case confirms that the earlier fears of copyright holders were not only well-founded, but also prescient. Despite the Second Circuit's assurance that *Cablevision* would not be expanded, both the district court and the Second Circuit have now expanded it. In fact, the panel below went so far as to conclude that it was important to validate Aereo's reliance on *Cablevision* in designing the Aereo service, even though *Cablevision* itself made clear that such reliance was unwarranted. *Id.* at 35a n.19 ("Stare decisis is

particularly warranted here in light of substantial reliance on *Cablevision*. As mentioned above, it appears that many media and technology companies have relied on *Cablevision* as an authoritative interpretation of the Transmit Clause."). Of course, this Court is not bound by *Cablevision*. It can refer directly to the statutory text and draw its own conclusions. But if the Second Circuit's newly expanded reading of *Cablevision* is upheld, widely shared concerns (by copyright scholars, then-Solicitor-General Kagan, and others) for the harmful effects that decision will have on the creative arts community will doubtless prove correct.

B. This Case Is Distinguishable From *Cablevision*

In all events, *Cablevision* does not mandate the outcome in this case, which is distinguishable in many material respects. As Judge Chin emphasized in his dissent, "there are critical differences between *Cablevision* and this case." Pet. App. 40a. Most importantly, perhaps, *Cablevision* involved a cable company that paid initial statutory licensing and retransmission fees for the content it retransmitted, whereas Aereo pays no such fees. Likewise, the subscribers in *Cablevision* were fully authorized to view television programs in real time through their cable subscriptions, whereas no portion of Aereo's retransmissions are authorized. In fact, Aereo's business model relies entirely on the unauthorized retransmission of broadcast programming without compensation.

The Second Circuit's unnecessary extension of *Cablevision*'s holding to encompass the unlicensed

and unauthorized retransmission of broadcast programming is a bridge too far. Nothing in *Cablevision* holds that a business *without* a license to retransmit programming in the first instance can somehow avoid the need to obtain one merely by retransmitting unique unauthorized copies of that programming. In *Cablevision*, the user-associated digital copies were recorded remotely by authorized subscribers who had already paid for the right to the content in the first place. In this case, by contrast, the user-associated digital copies were actually recorded by the *Aereo* service, which paid nothing for the right to the content.

The panel majority below, however, chose to ignore the fact that the type of service at issue in *Cablevision* fundamentally differs from the service model in this case, finding the absence of a license "not relevant" to Aereo's liability for unauthorized transmissions. Pet. App. 24a. In doing so, the panel extended the reach of *Cablevision* beyond all reason. Only reversal by this Court—confining *Cablevision* to its narrow facts in the process—can restore federal copyright protection to the creative broadcast industry.

III. IF AFFIRMED, THE DECISION BELOW WILL SIGNIFICANTLY HARM THE BROADCAST INDUSTRY AND THE PUBLIC

The Second Circuit's cramped reading of the public-performance right is manifestly wrong and threatens to cause significant and unjustified harm to numerous stakeholders in the broadcast entertainment industry. Those who invest in the

creation, production, and dissemination of broadcast television programming should be protected from free-riding on that investment. Not only does the court's holding undermine the goals of copyright law, it threatens to financially ruin an entire industry that relies on revenues derived from the statutorily-guaranteed public-performance right. The decision in this case also provides a clear roadmap that other would-be infringers can use to easily evade their own obligations under the Copyright Act.

At bottom, this is a case about property rights. The holding below, by fixating on the extra-statutory significance of a "unique copy," upends a delicately balanced property-rights regime. Copyright law developed over the centuries to carefully balance the desire to widely disseminate original works to the public with the need to foster and reward the creative genius that produces those works in the first place. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (stating that the purpose of copyright law is "to secure a fair return for an 'author's' creative labor" in order to "stimulate artistic creativity for the general public"). The public has benefitted most from new technologies in content delivery when they have been introduced within the confines of copyright licensing arrangements. The Copyright Act reflects this arrangement by requiring those who develop innovative ways to transmit programming to compensate copyright holders who own exclusive rights over that content.

The Second Circuit's myopic view of what constitutes a "public performance" permits companies such as Aereo to free-ride on the creativity and original genius of copyrighted works.

To insulate itself from copyright infringement liability within the Second Circuit, all an enterprising Internet-based company need do is structure its business model around retransmitting "unique copies" of original broadcast programming. If validated, other copy-cat entities will soon imitate Aereo's business model in order to exploit the statutory loophole created by the Second Circuit. This parasitic business model will lead directly to the stifling or elimination of much creative content.

Armed with binding Second Circuit precedent, such companies are now free to infringe broadcasters' public performance rights by circumventing the vital retransmission fee agreements on which the broadcast entertainment industry has long relied. "Retransmission fees include cash or other compensation that cable, satellite and telecommunications companies pay to local TV stations and, indirectly, to [broadcast] networks (such as CBS, NBC, ABC, Fox and CW) for the right to carry broadcast programming in the local markets." Katerina Eva Matsa, *Time Warner vs. CBS: The High Stakes of Their Fight Over Fees*, Pew Research Center, (August 21, 2013). Retransmission agreements reflect highly competitive, free-market negotiations between broadcasters and third-party content providers as envisioned by Congress when it enacted the Copyright Act in 1976. Such fees, estimated to be $2.37 billion for 2013, are a vital portion of broadcasters' revenues for the content they create and deliver to the public. *See id.* (citing Veronis Suhler Stevenson, Industry Forecast of Retransmission Fees (26th ed. 2012-2016)).

In light of both *Cablevision* and *Aereo*, the very real possibility exists that cable providers will soon no longer have any incentive to negotiate retransmission fee arrangements with broadcasters either. After all, "[i]t is intellectually and legally inconsistent to saddle the cable industry with billions of dollars each year of broadcast retransmission fees, while allowing a similarly for-profit company to pluck broadcast signals out of the air and sell them without paying any such fees." Andy Fixmer, et al., *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, Bloomberg News (Oct. 26, 2013). But if cable companies can simply capture original broadcast signals and retransmit them to their subscribers, copyright holders will be deprived of compensation for the content they create and provide.

Nor is there any reason to believe that Aereo will confine its profitable piracy to the Second Circuit. Indeed, Aereo now operates in Atlanta, Boston, Dallas, Miami, and Salt Lake City, and recently announced plans to expand to 20 other major cities, including Chicago, Houston, Philadelphia, and Washington, D.C. *See* Press Release, Aereo, Inc., *Aereo Announces Launch Date for Chicago* (June 27, 2013), *available at* https://aereo.com. As Aereo increasingly lures viewers away from watching original television broadcasts, which are tracked by Nielsen ratings, broadcasters stand to lose yet another vital source of revenue from advertisements. Consequently, broadcast networks may be forced to convert into cable channels to prevent any over-the-air access to their content.

Such a development would also penalize consumers of broadcast television. As U.S. District Judge Dale Kimball recently observed while preliminarily enjoining Aereo's infringing conduct, "[t]he public has an interest in continuing to receive unique, local programming provided by [Petitioners]." *Cmty. Telev of Utah, LLC v. Aereo, Inc.*, No. 2:13CV910DAK, slip op. at 17 (D. Utah Feb. 19, 2014). After all, "[o]riginal local programming, covering local news, sports, and other areas of interest, costs millions of dollars to produce and deliver to the public and the public interest plainly lies in enjoining copyright infringement that threatens the continued liability of such programming." *Id.* What is at stake in this case is nothing less than the continued viability of broadcast television as we know it.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the Second Circuit's holding below.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. N.W.
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

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