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 CABLEVISION SYSTEMS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Cablevision Systems Corporation provides cable television service in the New York metropolitan area and elsewhere. Pursuant to license agreements with television networks and other content providers, it distributes copyrighted materials over its cable system. Cablevision also developed the Remote Storage Digital Video Re-

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus* and its counsel made such a contribution.

corder ("RS-DVR") that the Second Circuit upheld against a copyright challenge in *Cartoon Network LP* v. *CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), cert. denied, 557 U.S. 946 (2009). The RS-DVR allows each subscriber to record television programs he is entitled to watch over cable as they air—just as he could with a VCR or set-top DVR. Each subscriber can then play back his own personal recordings for private viewing—again just as he could with a VCR or set-top DVR. Unlike those earlier technologies, however, the RS-DVR stores the subscriber's recordings remotely on Cablevision's premises.

Cablevision has a strong interest in this case. Following the Second Circuit's ruling upholding the RS-DVR, Cablevision invested hundreds of millions of dollars developing and deploying the RS-DVR in reliance on that decision. Cablevision began offering the RS-DVR in January 2011 and now has over half a million RS-DVR subscribers. In the decision below, the Second Circuit relied squarely on its earlier *Cablevision* decision in upholding Aereo's service, and petitioners challenge the reasoning of both decisions here. Because Cablevision currently operates the system the Second Circuit previously upheld, it has a direct interest in this case.

Moreover, this case implicates a complex marketplace with rapidly evolving technologies. Cablevision both provides cutting-edge technologies that subscribers use to make fair-use copies and pays license fees to copyright holders to distribute content over its cable system. For that reason, Cablevision has a unique—and uniquely balanced—perspective.

SUMMARY OF ARGUMENT

Cablevision agrees with petitioners that Aereo's system infringes the public performance right. But petitioners advance expansive arguments that needlessly cast

doubt on other technologies, including both the RS-DVR and a vast array of other cloud-based services that consumers use to store and play back lawful recordings. The Court should rule against Aereo on narrower grounds.

I. Under the Copyright Act's Transmit Clause, one way to perform a work publicly is to "transmit * * * a performance * * * of the work * * * *to the public*, * * * whether the members of the public capable of receiving the performance * * * receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101 (emphasis added). Although that clause clearly covers some individualized transmission systems such as video on demand, it applies only where the transmission of a performance is "to the public," *i.e.*, held out generally for any member of the public to receive. In *Cablevision*, the Second Circuit correctly held that Cablevision's RS-DVR does not fall within that definition because the only person who can play back a recording is the one subscriber who made it.

II. Petitioners assert that a service provider infringes the public performance right whenever it makes the same *prior* performance of a work—such as the same prior broadcast of a television show—available to multiple subscribers. Despite petitioners' disclaimers, the underlying logic of that position would threaten numerous lawful cloud technologies already in widespread use. It would also upset the settled distinction between downloading and streaming. That petitioners' interpretation threatens technologies that petitioners themselves do not seek to condemn proves that their interpretation cannot be correct.

III. Petitioners' interpretation also lacks support in the text or history of the Copyright Act. *Cablevision* properly held that, "when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission"—not to some

prior performance. 536 F.3d at 136. None of petitioners' critiques of that holding withstands scrutiny.

IV. Finally, petitioners' expansive prior performance theory is by no means necessary to justify a ruling against Aereo. Aereo operates a television retransmission service no different from the systems Congress targeted in the 1976 Copyright Act. Aereo's individual mini-antennas and individual hard-drive copies do not alter the fundamental nature of the service Aereo is providing. A narrow ruling on those grounds would be fully consistent with *Cablevision* and would allow the Court to enjoin Aereo's unlawful service without casting doubt on other lawful technologies.[2]

ARGUMENT

I. THE TRANSMIT CLAUSE EXTENDS ONLY TO TRANSMISSIONS "TO THE PUBLIC"

A. Individualized Transmission Systems

Before the 1976 Copyright Act, this Court had held that cable systems do not "perform" a work when they retransmit it to subscribers. See *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp.* v. *Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974). Congress overturned that interpretation. It "believe[d] that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid." H.R. Rep. No. 94-1476, at 89 (1976). Congress thus amended the Act to clarify that the public performance right applies to cable systems, while subjecting them to a statutory licensing scheme. 17 U.S.C. §§ 101, 111.

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[2] Cablevision's position is explained at greater length in its recent white paper on the public performance right. See Cablevision Systems Corp., *Aereo and the Public Performance Right* (Dec. 12, 2013), www.cablevision.com/pdf/cablevision_aereo_white_paper.pdf.

To accomplish that result, Congress defined the term "perform" as "to recite, render, play, dance, or act [a work] * * * 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." 17 U.S.C. §101. And, in the so-called Transmit Clause, Congress provided that "[t]o perform * * * a work 'publicly' means," among other things, "to transmit * * * a performance * * * of the work * * * to the public, * * * whether the members of the public capable of receiving the performance * * * receive it in the same place or in separate places and at the same time or at different times." *Ibid.*

The Transmit Clause did more than bring cable systems within the scope of the public performance right. It also addressed the Act's applicability to *individualized* transmission systems. Traditional cable systems, like radio or television broadcasts, transmit content along a single shared transmission path to the public. When a radio listener, broadcast television viewer, or cable subscriber accesses content, he is tapping into the same common transmission stream sent out to everyone at the same time.

As technology developed, however, systems began to use individualized transmissions to deliver content at the request of a recipient and at a time of his choosing. For example, many cable and satellite companies now offer "video on demand" services that allow subscribers to watch movies or other content from a provider-selected library at a time of the subscriber's choosing. When a subscriber selects a movie to watch, the system shows it by individualized transmission to that subscriber alone. Similarly, when a subscriber uses an Internet radio or jukebox service like Pandora, the company streams music by individualized transmission to that particular subscriber's computer or mobile device.

The Transmit Clause addresses such systems by clarifying that a transmission of a performance may be "to the public" "whether the members of the public capable of receiving the performance * * * receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101. As the legislative history explains, "a performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place." H.R. Rep. No. 94-1476, at 64-65. "The same principles * * * are also applicable where the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public." H.R. Rep. No. 90-83, at 29 (1967).

The "separate places/different times" language clearly assumes that *some* individualized transmission systems render performances "to the public" despite their individualized nature—otherwise the clause would be superfluous. As a matter of simple grammar, however, the clause does *not* say that a transmission of a performance is "to the public" merely because it is received at separate places or different times. The clause states that, *if* a transmission of a performance is otherwise "to the public," it does not cease to be so merely because it is actually received on an individualized basis. The key question remains, therefore, whether the transmission of the performance is "to the public."

In both ordinary and legal usage, something is "public" if it is "[o]pen or available for all to use, share, or enjoy," *Black's Law Dictionary* 1348 (9th ed. 2009), or "accessible to or shared by all members of the community," *Webster's Third New International Dictionary* 1836 (2002). Courts thus determine whether something is "public" based on whether it is held out or made available

to a broad range of potential recipients. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160, 172 n.10 (1976) (schools were "'more public than private'" because they catered to "'all children in the area who can meet their academic and other admission requirements'"); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 & n.8 (1973) (club open "'to the public'" because there was "'no selective element other than race'"); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983) (forum not open "to the public" where it afforded only "selective access," not "indiscriminate use"). The word "public" means the same thing in the Transmit Clause: A "public" performance is one that is "'open' to, that is, available to, a substantial number of persons." 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][2] (2013).

In *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), for example, a video rental store offered to transmit movies from videotapes in a central player to patrons seated in individual viewing booths. The service infringed the public performance right because it transmitted performances "to the public": Even though "members of the public view the performance at different times," the proprietor's library of videotapes was "'*made available* by transmission to the public at large.'" *Id.* at 159 (emphasis added). Another court reached a similar result in *On Command Video Corp.* v. *Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991), finding infringement of the public performance right where a hotel proprietor offered to transmit movies to guest rooms upon request from a central bank of videocassette players.

The systems in *Redd Horne* and *On Command* were precursors to modern video-on-demand services widely offered by cable and satellite providers today, as well as similar services offered over the Internet by websites

such as Netflix. Video-on-demand services transmit performances "to the public" because any member of the public can receive a transmission of a performance from the provider's pre-selected library of movies or other content simply by signing up and paying the fee. A clear industry consensus has emerged that such video-on-demand systems transmit performances "to the public," and that the provider must obtain a public performance license from the copyright owner.

Of course, as in *Redd Horne* and *On Command*, each individual video-on-demand transmission is *actually received* by only one person. But what matters under the Transmit Clause is the *potential audience*, not how many people *actually receive* a transmission. A theater owner who sells tickets to the public engages in a public performance even if only one person ends up attending. And a television broadcaster engages in a public performance even if only one person—or nobody at all—turns on his television set. See H.R. Rep. No. 94-1476, at 64-65. The same is true for video on demand: The transmissions are public performances because they are offered to anyone who wants to receive them, even though each one is ultimately received by only one person.

That focus on the *potential audience* is fundamental to the public performance right. If a brother calls his sister one Saturday morning and asks her to sing "Happy Birthday" over the phone, the performance is clearly private. But if that same sister realizes she really enjoys singing "Happy Birthday" over the phone and posts a sign in the grocery store that says, "Anyone who wishes to hear me sing Happy Birthday can call me this Saturday morning and I will sing it," the performance is public—even if her brother happens to be the only person who reads the sign and calls. While both situations involve the same content, the same sender and recipient, and the same individualized transmission path, the criti-

cal difference is the potential audience: In the second situation, the sister has held out her performance to the public at large.

To be sure, *after a transmission begins*, the only potential audience for a particular transmission may be the one person receiving it. But what matters is the potential audience for a transmission at the time the service provider holds out its content and offers to transmit it, before any particular transmission is sent. For example, when a video-on-demand subscriber orders a movie, the particular transmission stream he receives is dedicated to him and cannot be received by anyone else. But that does not make video on demand a private performance. The transmissions are "to the public" because, from an *ex ante* perspective, the service provider is offering to transmit particular content to anyone willing to pay for it. *Any subscriber* is capable of receiving the next transmission of a performance from the video-on-demand system, even though the transmissions are made by dedicated streams on a one-at-a-time basis.

Similarly, when an Internet user plays a movie or television show on a website like Netflix, the particular transmission stream he receives is dedicated to him alone. But that does not change the fact that, at the time the website operator offered to transmit that particular content over the Internet, any user could have received the transmission simply by signing up. The relevant question is not who can receive a particular transmission once it has been sent; the question is who could have received the transmission before it was sent.

In that respect, video on demand and Netflix are no different from hotels or other "public" accommodations. A hotel offers rooms "to the public" because anyone willing to pay can occupy a room—even though, once a particular guest pays for a room, he is the only one who can use it. The same is true for video on demand and Netflix.

B. The *Cablevision* Decision

Cablevision provides cable television service, carrying more than 400 channels under licenses with programmers. For years, Cablevision has offered traditional set-top DVRs to its subscribers. Set-top DVRs, however, have shortcomings—Cablevision must install an individual unit with an expensive hard drive in each home, and repairs or upgrades require disruptive house calls. Cablevision therefore developed the Remote-Storage DVR or "RS-DVR." The primary difference between the RS-DVR and a traditional DVR is where the recordings are stored. With a set-top DVR, recordings are stored on a hard drive in the set-top box. With the RS-DVR, each customer's recordings are stored on hard drives in a central location.[3]

To the subscriber, the processes of recording and playback on the RS-DVR are almost identical to those of a standard set-top DVR. With both systems, the subscriber can record a program by pressing "record" on his remote control when watching television or by scheduling the recording in advance from an on-screen guide. With both systems, the subscriber can then play back his recording by selecting it from an on-screen list of the programs he has recorded.

As with a VCR or conventional set-top DVR, an RS-DVR subscriber can choose to record only programs he could have received and watched when they aired at their regularly scheduled times under his cable subscription. The subscriber's selected shows are recorded only when they air over the cable system. The RS-DVR segregates each subscriber's recordings, so if 1,000 people all choose to record an episode of "Modern Family," 1,000 separate

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[3] An animation comparing the RS-DVR to a typical set-top DVR, used as a demonstrative in the *Cablevision* litigation, is available at www.cablevision.com/RS-DVRvideo.

recordings are made. A subscriber cannot play back anything but the programs he recorded, and no other subscriber can access his recordings. Rather, the subscriber's recordings are available for playback to him and him alone.

Cablevision's RS-DVR is an example of a technology trend known as "cloud computing." Increasingly, technology companies provide services to customers by means of remote storage and processing "in the cloud"—*i.e.*, on the Internet or at some other remote location. While consumers once received emails through client applications on their personal computers, they can now use web-based services like Gmail. While consumers once stored documents on local media, they can now store them remotely with services such as Amazon's Cloud Drive or Apple's iCloud. Centralizing storage and processing allows technology providers to offer services more efficiently and conveniently.

The RS-DVR is just one more example of that transition to cloud storage. Consumers have long used VCRs and set-top DVRs to record television programs for later viewing. In *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court upheld the use of personal recording devices for that purpose, ruling that consumer "time-shifting" is fair use. *Id.* at 447-456. The RS-DVR is simply a DVR with the recording and storage hardware moved to Cablevision's head-end—a DVR "in the cloud."

Nonetheless, in 2006, broadcasters and other content owners sued, alleging that the RS-DVR would infringe their public performance rights whenever a subscriber played back his recordings. The Second Circuit rejected that argument. "[I]n determining whether a transmission is made to the public," it explained, a court must "discern who is 'capable of receiving' the performance being transmitted." *Cablevision*, 536 F.3d at 134 (quot-

ing 17 U.S.C. § 101). The legislative history, it added, focuses on the "'potential recipients of the transmission.'" *Id.* at 135 (quoting H.R. Rep. No. 94-1476, at 64-65) (emphasis omitted). The Act thus requires a court to "examine who precisely is 'capable of receiving' a particular transmission of a performance." *Ibid.*

The broadcasters urged that Cablevision was transmitting the same *prior* performance of a work to multiple members of the public—specifically, the performance that occurred "when the programming service supplying Cablevision's content transmit[ted] that content to Cablevision" at some earlier time. 536 F.3d at 136. The court rejected that "original performance" theory: "[W]e believe that when Congress speaks of transmitting a performance to the public, it refers to *the performance created by the act of transmission*." *Ibid.* (emphasis added). In other words, the relevant "performance" for purposes of evaluating whether a performance is transmitted "to the public" is not the *prior* performance from which the transmitter obtains its content, but the performance that occurs when the transmitter communicates that content to a subscriber. And "because the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, * * * the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission." *Id.* at 137.[4]

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[4] The Second Circuit did not reach Cablevision's alternative argument that it could not be a direct infringer because its subscribers were the ones "doing" the transmitting. See 536 F.3d at 134. Courts of appeals have uniformly held that direct infringement requires volitional conduct sufficient to make the defendant the one "doing" the infringing act. See *Fox Broad. Co.* v. *Dish Network LLC*, 723 F.3d 1067, 1073-1074 (9th Cir. 2013); *Cablevision*, 536 F.3d at 130-133; *Parker* v. *Google, Inc.*, 242 F. App'x 833, 836-837 (3d Cir. 2007); *Co-Star Grp., Inc.* v. *LoopNet, Inc.*, 373 F.3d 544, 548-552 (4th Cir.

The argument that petitioners advance before this Court is the same argument the Second Circuit considered and rejected in *Cablevision*. According to petitioners, the relevant "performance" under the Transmit Clause is not "the performance created by the act of transmission" as *Cablevision* held, 536 F.3d at 136, but rather the *prior* performance from which the transmitter originally obtained the content. Aereo, they urge, is publicly performing their works because "the *broadcasts Aereo captures for retransmission* are performances of copyrighted works" and "Aereo offers retransmission of *these performances* to the public." Pet. Br. 23 (emphasis added). Thus, in petitioners' view, so long as a transmission system makes the same *prior* performance of a work available to multiple subscribers, it is transmitting performances "to the public"—even if each *transmission* is available to only one person.

As explained below, that novel theory would have dramatic consequences far beyond the facts of this case. It is a misconstruction of the Copyright Act. And it is by no means necessary to hold Aereo's service unlawful.

II. PETITIONERS' INTERPRETATION THREATENS EXISTING TECHNOLOGIES

Petitioners' prior performance theory calls into question numerous technologies already in widespread use.

A. Cloud Technologies

Petitioners' interpretation threatens a wide array of cloud-based technologies. For example, suppose two consumers independently purchase the same album from an online music retailer like Amazon's MP3 Store. Each

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2004). The court below did not address that issue here. But there are compelling arguments that, when subscribers use the RS-DVR or other cloud technologies to play back content they stored remotely, the subscribers are the ones "doing" the transmitting. The Court should avoid prejudging that issue here.

consumer uploads the songs to his own personal storage space on Amazon's Cloud Player service and then listens to them by streaming the music back to himself. On petitioners' theory, Amazon would be publicly performing the songs because it would be transmitting the same *prior performance* (*i.e.*, the musician's earlier performance recorded on the album) to multiple members of the public. That would be true even though each *transmission* was available to only one person—the subscriber who uploaded the particular album being played back.

Alternatively, suppose a corporation maintains an internal corporate intranet where its employees can store and retrieve their personal work files. Two employees both happen to save and play back the same previously aired news clip. On petitioners' theory, the corporation would be publicly performing the clip merely because both employees happened to play back the same previously aired show.

Indeed, petitioners' theory would imperil nearly any cloud technology that enables remote storage and playback of prior performances. Such a rule would be catastrophic. Cloud computing is a major and rapidly growing sector of the economy. One Harvard Business School study found that "the *Cablevision* decision led to additional incremental investment in U.S. cloud computing firms that ranged from $728 million to approximately $1.3 billion over the two-and-a-half years after the decision." Josh Lerner, Harvard Business School, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* 1 (2011). Petitioners' theory would have a disastrous effect on a major sector of the technology industry.

Petitioners insist that a ruling in their favor "need not threaten the future of 'cloud computing' technology" because "[t]here is an obvious difference between a service that merely stores and provides an individual user access

to copies of copyrighted content that the user already has legally obtained, and a service that offers the copyrighted content itself to the public at large." Pet. Br. 45-46. There is indeed an obvious difference between the two. But petitioners never explain why, as a textual matter, their prior performance theory would not apply to the former as well as the latter—why the public or private nature of a transmission should depend on how and from whom the user obtained the content being transmitted.

Petitioners offer no coherent alternative to the Second Circuit's interpretation. They advance an overbroad prior performance theory and then, in an effort to avoid its absurd results, engraft on an ad hoc exception for cloud technologies. That petitioners' textual interpretation threatens cloud technologies that petitioners themselves do not claim to be covered is proof that their interpretation cannot be correct.

B. Downloading and Streaming

Petitioners' interpretation would also upend the settled distinction between downloading and streaming. For years, the industry has understood that there is a legal distinction between "streaming" (transmitting a song or video for contemporaneous listening or viewing) and "downloading" (transmitting a copy of the file for later use). While streaming may constitute a public performance, downloading does not. That distinction is important because it means that an online music or video retailer does not engage in a public performance when it sells copies of songs or videos over the Internet. The retailer may need a reproduction or distribution license, but it does not need a *public performance* license.

The Second Circuit reached precisely that result in *United States* v. *ASCAP*, 627 F.3d 64 (2d Cir. 2010). The content owners in *ASCAP* argued that downloads are public performances because vendors transmit "the *ini-*

tial or underlying performance of the copyrighted work." *Id.* at 73 (emphasis added). *ASCAP* rejected that argument, invoking *Cablevision*'s holding that the Transmit Clause "'refers to the performance created by the act of transmission,' not simply to transmitting a recording of a performance." *Ibid.* Because the *transmissions* did not effect any contemporaneous renditions, the downloads were not public performances. *Id.* at 74.

On petitioners' theory, that case would have come out the other way. A download of a recorded performance of a musical composition or a download of a previously broadcast television show would constitute a public performance: The online retailer would be transmitting that *prior* performance—the previously recorded rendition or broadcast—to the public. That would mean that every online music or video retailer violates the public performance right whenever it transfers a file containing a prior performance to a consumer. That would be a massive change in the law.

III. PETITIONERS' INTERPRETATION IS INCORRECT

Petitioners offer a number of arguments in support of their prior performance theory, but none withstands scrutiny. By contrast, there are several reasons to adopt *Cablevision*'s interpretation that the relevant performance is the one created by the act of transmission.

A. *Cablevision* Did Not Improperly Conflate "Performance" with "Transmission"

Petitioners accuse *Cablevision* of conflating "performance" with "transmission" by focusing on the potential audience of a particular *transmission* when the Transmit Clause refers to persons capable of receiving a "performance." See Pet. Br. 33-34 ("[T]he transmit clause does not say 'capable of receiving the *transmission*.' It says 'capable of receiving the *performance or display*.'"). Congress, petitioners claim, could not possibly have been

interested in the potential audience of a *transmission*: "'[V]ery few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in watching the *performance* of the *work*.'" Pet. for Cert. 28-29. Far from confusing the two statutory terms, however, *Cablevision* simply interpreted the statute as Congress wrote it.

The Copyright Act makes clear that one way to "perform" a work publicly is to "transmit" a performance to the public. Under the Transmit Clause:

> To *perform* * * * a work "publicly" means—
>
> (1) to *perform* * * * it at a place open to the public * * * ; or
>
> (2) to *transmit* or otherwise communicate a performance * * * of the work * * * to the public, * * * whether the members of the public capable of receiving the performance * * * receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. §101 (emphasis added). The *Act itself* thus defines a transmission of a performance to be one kind of "performance," by defining "to transmit" as one way "to perform." When petitioners complain that *Cablevision* confused "transmission" with "performance," they are objecting to a basic feature of the statute itself. To be sure, the Act defines "perform" and "transmit" as two separate terms, and not every performance is a transmission or vice versa. But the statute makes clear that a transmission of a performance is one type of performance, and to that extent, the terms overlap.

That same point also follows from the Act's definition of "perform": "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." 17 U.S.C. §101 (emphasis added). When a cable service transmits

programming to its subscribers, it is "show[ing] [the] images" of the work by means of that transmission. The transmission itself effects a "show[ing]" that constitutes a performance, wholly apart from any prior performance such as an earlier over-the-air broadcast.

The legislative history removes any doubt. As the 1976 House Report explains, "the concept[ ] of public performance * * * cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public." H.R. Rep. No. 94-1476, at 63. Thus, "a broadcasting network is performing when it transmits [a performance of a song]; * * * [and] a cable television system is performing when it retransmits the broadcast to its subscribers." *Ibid.* "[A]ny act by which the initial performance * * * is transmitted, repeated, or made to recur would itself be a 'performance' * * * under the bill." *Ibid.* Congress thus could not have been more clear that "a transmission of a performance is itself a performance." *Cablevision*, 536 F.3d at 134.

Cablevision recognized that there is a potential ambiguity in the statute because the Transmit Clause does not specify *which* "performance" it is referring to: (1) the performance created by the act of transmission; or (2) some *prior* performance. *Cablevision* ruled in favor of the former alternative. 536 F.3d at 136. For reasons explained below, that holding was correct. See pp. 22-24, *infra*. The point here, however, is simply that petitioners' disagreement with *Cablevision* over *which* "performance" Congress was referring to does not mean *Cablevision* conflated the terms "transmission" and "performance" or otherwise ignored the terms of the statute.

B. *Cablevision* Did Not Ignore the "Different Times" Clause

Petitioners also assert that "the Second Circuit's construction * * * renders a significant part of the [Transmit Clause] entirely superfluous." Pet. Br. 32-33. The Transmit Clause applies when "members of the public capable of receiving *the performance* * * * receive *it* * * * *at different times*." 17 U.S.C. §101 (emphasis added). According to petitioners, that definition proves that the relevant "performance" must be some prior performance, such as the original broadcast of a television show or the original rendition of a musical work, rather than the performance created by the act of transmission. That is so, they claim, because "it is essentially impossible for two people to receive *the same transmission* of a performance 'at different times.'" Pet. Br. 33.

That argument misreads the statute. Although the word "the" can be used to identify a specific item, it can also be used to "[i]ndicat[e] that a concrete term is to be understood generically and not individually," as in "*the* pen is mightier than *the* sword." *Webster's New International Dictionary of the English Language* 2617 (2d ed. 1954). Thus, a sign in a car rental agency stating that "Customers are responsible for any damage to the automobile during the rental period" is not implying that all customers must rent the same car at the same time. It is simply using the terms "the automobile" and "the rental period" to refer generically to whatever car and rental period are associated with a particular customer.

That is how the Transmit Clause uses the word. The reference to "the performance" in the phrase "members of the public capable of receiving the performance" is not a reference to a single unified performance that various members of the public all collectively receive. It is a generic reference to whatever performance each member of the public happens to receive.

The legislative history uses the term precisely that way. The 1967 House Report, discussing "sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public," explains that the Transmit Clause applies "where *the transmission* is capable of reaching different recipients *at different times*." H.R. Rep. No. 90-83, at 29 (emphasis added). Congress itself thus understood that members of the public could receive "the transmission," in the generic sense, "at different times"—precisely the formulation petitioners deem "essentially impossible." Pet. Br. 33.

The Second Circuit thus did not render the "different times" clause "entirely superfluous." Pet. Br. 32-33. Transmission systems that hold out content for individualized transmission *to the public*—such as video-on-demand services or websites like Netflix—render public performances because any subscriber can receive the next transmission simply by signing up. Each transmission is available to the public because, the moment before transmission begins, whatever person signs up next will receive it. The "different times" clause makes clear that such performances are public even though each subscriber receives "the transmission"—*i.e.*, whatever transmission he receives—"at different times." That is how Congress intended the Transmit Clause to operate, and nothing in the Second Circuit's opinion is in any way inconsistent with that design.

C. *Cablevision* Has Broad Academic Support

Unable to defend their theory on the merits, petitioners appeal to authority, asserting that *Cablevision* has been "widely criticized by commentators." Pet. Br. 8-9 & n.2 (citing three commentators). That is incorrect. Leading treatises agree with *Cablevision* that whether the Transmit Clause applies depends on the potential audience of each *transmission*. Professor Nimmer writes

that, "if a *transmission* is only available to one person, then it clearly fails to qualify as 'public.'" 2 *Nimmer on Copyright* § 8.14[C][2]; see also *id.* § 8.14[C][3]. Professor Patry agrees that "the dividing line made in the statute is between those *transmissions* capable of being heard by multiple recipients * * * and those that are incapable of being so heard." 4 William F. Patry, *Patry on Copyright* § 14:28 (2014) (emphasis altered); see also Jessica Litman, *Readers' Copyright*, 58 J. Copyright Soc'y U.S.A. 325, 350-351 & n.126 (2011); Jacqueline D. Lipton, *Cyberspace, Exceptionalism, and Innocent Copyright Infringement*, 13 Vand. J. Ent. & Tech. L. 767, 792-796 (2011); Jonah M. Knobler, *Performance Anxiety*, 25 Cardozo Arts & Ent. L.J. 531, 564-566 (2007).

Moreover, when the broadcasters were seeking Supreme Court review of *Cablevision*, a group of 26 law professors wrote the Solicitor General urging her to recommend denial. See Letter from Julie E. Cohen, *et al.*, to the Hon. Elena Kagan (Apr. 13, 2009).[5] That letter explained that *Cablevision* "properly concluded that the potential audience 'capable of receiving' any given RS-DVR transmission is an audience of one." *Id.* at 3. "Because Cablevision does not hold out any RS-DVR transmissions to the general public, it necessarily follows that Cablevision does not engage in any 'public' performances * * * ." *Ibid.* Compared to that scholarly consensus, petitioners' handful of three authorities is a clear minority view.[6]

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[5] A copy of that letter can be found as an exhibit to Cablevision's white paper. See p. 4 n.2, *supra*.

[6] Numerous trade groups representing a broad array of companies have likewise agreed with *Cablevision*'s interpretation. See, *e.g.*, Brief of *Amici Curiae* Center for Democracy & Technology, *et al.*, in *Cablevision*, No. 07-1480-cv, at 19-20 (2d Cir. filed June 8, 2007) ("Where multiple customers view their own personal copies of a copyrighted work in their own homes, that is at most parallel private

D. The Relevant "Performance" Is the Performance Created by the Act of Transmission

While petitioners' attacks on *Cablevision* fall short, the arguments in favor of *Cablevision*'s holding are compelling. For several reasons, *Cablevision* properly interpreted the reference to "performance" in the Transmit Clause to mean the performance created by the act of transmission, not some prior performance.

First, that interpretation is the only one that reconciles the statutory text with the legislative history. Although the Transmit Clause refers to "members of the public capable of receiving the *performance*," 17 U.S.C. § 101 (emphasis added), the legislative history repeatedly refers to the potential audience of the *transmission*. For example, the 1967 House Report states that the Transmit Clause applies "where the *transmission* is capable of reaching different recipients at different times." H.R. Rep. No. 90-83, at 29 (emphasis added). The 1976 House

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viewing, not a public performance."). The signatories to that brief were the Center for Democracy & Technology, the Electronic Frontier Foundation, Public Knowledge, the Broadband Service Providers Association, the Computer & Communications Industry Association (whose members include Data Foundry, Dish, eBay, Facebook, Google, Intuit, LightSquared, Microsoft, NetAccess, Nvidia, OpenConnect, Pandora, Red Hat, Sprint, T-Mobile, XO Communications, and Yahoo!), NetCoalition (whose members included Google, Amazon, eBay, IAC, PayPal, Bloomberg, and Yahoo!), the American Library Association, the American Association of Law Libraries, the Association of Research Libraries, the Medical Library Association, the Special Libraries Association, the Consumer Electronics Association (a group with over 2000 members including ActiveVideo, Cisco, Apple, Sony, and Comcast), the Home Recording Rights Coalition, CTIA – The Wireless Association (a group with dozens of members including AT&T, Verizon Wireless, U.S. Cellular, T-Mobile, Apple, Cisco, Dish, Google, Disney-ESPN, and Nokia), the Internet Commerce Coalition, and USTelecom (which represents numerous U.S. telecom companies, including AT&T and Verizon).

Report similarly refers to "the potential recipients of the *transmission*." H.R. Rep. No. 94-1476, at 64-65 (emphasis added).

That interchangeable use of "transmission" and "performance" makes sense only if the relevant "performance" is the one created by the act of transmission. In that case, the potential audience for the "performance" and the potential audience for the "transmission" are one and the same, so referring interchangeably to the two is entirely natural. By contrast, if the relevant "performance" is some *prior* performance, the two terms are *not* interchangeable, because the potential audience for the prior performance could be much larger. That the legislative history uses the terms interchangeably shows that Congress had the former interpretation in mind.

Second, petitioners' construction is incoherent in the many contexts where *there is no prior performance*. For example, a sporting event is not a "performance," because the players on the field are not performing any work entitled to copyright protection. See *Nat'l Basketball Ass'n* v. *Motorola, Inc.*, 105 F.3d 841, 846-847 (2d Cir. 1997). Thus, when a network broadcasts a sporting event, the *only* performance being transmitted is the performance created by the act of transmission—there is no prior performance. The same is true where a video-on-demand service transmits an original animated movie or an Internet radio website transmits a computer-synthesized musical work: There would typically be no prior performance at all, only the performance created by the transmission. See Knobler, *supra*, at 565-566 & n.103. The many contexts where a transmission does not involve any prior performance suggests that Congress would not have drafted the Transmit Clause with prior performances in mind.

Finally, as already noted, petitioners' theory eliminates the distinction between downloading and stream-

ing. If the relevant "performance" is the one created by the act of transmission, as *Cablevision* held, making files available for download is not a public performance, because there is no contemporaneous rendition or showing. By contrast, if the relevant "performance" is some *prior* performance, such as the performance that occurred when musicians played a song in the recording studio, making files available for download *is* a public performance: The transmitter is "transmit[ting] * * * *[a prior]* performance * * * of the work * * * to the public." 17 U.S.C. §101. That cannot be right.

E. Even If a Prior Performance Is Relevant, the Transmission Must Still Be "to the Public"

Even if petitioners were correct that the term "performance" in the Transmit Clause encompasses prior performances—so that, for example, a cable system was transmitting a broadcast station's *prior* performance of a television show when retransmitting the content to the public—that still would not support their expansive construction. The Transmit Clause applies where a person "transmit[s] * * * a performance * * * of the work * * * *to the public*, * * * whether the members of the public capable of receiving the performance * * * receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101 (emphasis added). That "to the public" requirement applies regardless of which performance the term "performance" refers to: Whether "performance" refers to the performance created by the act of transmission or some prior performance, the provider still must be "transmit[ting]" the performance "to the public." As the legislative history puts it: "Although any act by which the initial performance * * * is transmitted, repeated, or made to recur would itself be a 'performance' * * * under the bill, it would not be actionable as an infringement unless it [*i.e.*, the

transmission] were done 'publicly,' as defined in section 101." H.R. Rep. No. 94-1476, at 63.

As explained earlier, in both ordinary and legal usage, something is "public" only if it is held out or made available to a substantial number of persons. See pp. 6-7, *supra*; 2 *Nimmer on Copyright* § 8.14[C][2] ("public" performance is one "'open' to, that is, available to, a substantial number of persons"). Under the statute, therefore, a transmitter is not publicly performing a work unless it is transmitting a performance "to the public"—that is, making the performance generally available or holding it out to the public at large. That is true even if the "performance" is some prior performance rather than the performance created by the act of transmission.

Thus, a cloud service like Amazon Cloud Player is not publicly performing when two subscribers happen to upload and stream back their own separate copies of the same music album or the same television show. Although Amazon's servers may transmit the same prior performance of the song or show to multiple subscribers, Amazon is not transmitting that performance "to the public," because it is not holding out the performance or making the performance generally available. It is merely offering a service that enables separate private performances of content that each individual subscriber independently selected and chose to upload.

The same is true of Cablevision's RS-DVR. That multiple subscribers may independently choose to record and play back the same previously broadcast television show does not mean that Cablevision is transmitting that prior performance "to the public." Cablevision simply offers a service that allows subscribers to engage in private performances by recording television shows of their own choosing and then playing back their own personal recordings to themselves.

Those systems stand in sharp contrast to a typical video-on-demand service or a website like Netflix. Such services select a library of content and hold it out to the public by offering to transmit performances to anyone willing to pay. Even though the performances are delivered by individualized transmissions, they are still held out generally to the public. The same cannot be said of cloud technologies like remote DVRs.

The Transmit Clause's "separate places/different times" language does not say otherwise. As already explained, that language by its terms does not expand the scope of the clause. It simply clarifies that, *if* a performance is otherwise transmitted "to the public," the performance does not cease to be public merely because it is received at separate places or different times. 17 U.S.C. §101. Thus, even if the term "performance" includes prior performances, the question remains—as always—whether the service provider is transmitting those performances "to the public."

Petitioners themselves admit that "[t]here is an obvious difference between a service that merely stores and provides an individual user access to copies of copyrighted content that the user already has legally obtained, and a service that offers the copyrighted content itself to the public at large." Pet. Br. 46. And while they take issue with *Cablevision*'s interpretation of the Transmit Clause, they concede that *Cablevision* was not necessarily incorrect to uphold the lawfulness of the RS-DVR. Pet. Br. 37-38 n.5. Those observations are undoubtedly correct. There is an obvious difference between a television retransmission service like Aereo's and a service that merely stores and plays back for an individual subscriber the content that that particular subscriber has selected and lawfully recorded.

Aereo holds out copyrighted content for retransmission to the public at large without a license. Remote-

storage services, by contrast, do not. They merely allow a subscriber to store and access remotely the personal content he has otherwise acquired. The RS-DVR fits comfortably within that latter category. To be sure, Cablevision *also* operates a cable system by which it offers to retransmit live television broadcasts to its subscribers. But Cablevision has a license to provide that distinct service. The RS-DVR merely allows subscribers to record and play back their own personal lawful copies of those programs, just like a VCR or set-top DVR but with remote rather than local storage. The RS-DVR thus falls squarely within the category of cloud technologies that petitioners themselves admit is fundamentally different from Aereo's service. Whatever the Court decides with respect to Aereo, it should craft its ruling so as not to cast doubt on the RS-DVR or the vast array of other cloud technologies that rely on remote storage.

IV. AEREO'S SERVICE SHOULD BE ENJOINED ON NARROWER GROUNDS

Although petitioners rely on incorrect legal arguments, they ultimately reach the right result. Aereo's system can and should be enjoined, consistent with *Cablevision*'s transmission-based interpretation of the Transmit Clause.

A. Congress Enacted the Transmit Clause Specifically To Cover Television Retransmission Systems

The Transmit Clause cannot be interpreted in a vacuum. It was enacted to address specific issues and should be interpreted with that context in mind. Foremost among them was television retransmission services. Previously, the Supreme Court had held that cable systems do not perform the works they retransmit. See *Fortnightly*, 392 U.S. 390; *Teleprompter*, 415 U.S. 394. Congress enacted the Transmit Clause to reject that

view, opining that "cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid." H.R. Rep. No. 94-1476, at 89.

Aereo is functionally identical to a cable system. It captures over-the-air broadcast signals and retransmits them for subscribers to watch. Aereo thus is not meaningfully different from services that have long been required to pay royalties. That fact sharply distinguishes Aereo from cloud technologies like remote-storage services and remote DVRs. The RS-DVR, for example, is not a substitute for cable service. If anything, it is a substitute for VCRs and set-top DVRs—technologies that have never been understood to require a license, at least since *Sony*.

A service like Aereo's that so closely replicates the essential function of the services Congress targeted should give the Court pause. Aereo should bear a heavy burden to show that its architecture somehow removes it from the Act's coverage. Aereo cannot meet that burden.

B. Mere Insertion of Individual Antennas and Hard-Drive Copies Does Not Make Performances Private

Aereo relies on two design features to justify its private performance argument: its individual mini-antennas and individual hard-drive copies. Neither feature converts Aereo's retransmissions into private performances.

Aereo takes a particular pool of content—the broadcast television signals it captures from the airwaves—and offers to transmit that content to anyone willing to pay. Any member of the public can receive the next transmission of that content simply by signing up. That same pool of shared content is made available for transmission to all

subscribers. Under those circumstances, Aereo is properly viewed as offering transmissions "to the public."

Aereo is no different from a cable system or video-on-demand provider. A cable system captures a particular pool of content—the broadcast television signals it captures from the airwaves—and offers to retransmit that content to any subscriber who wants to receive it. Likewise, a video-on-demand provider acquires a particular pool of content—its library of movies or television shows—and offers to transmit that content to any subscriber who wants to receive it. The fact that Aereo delivers programming on an individualized basis through mini-antennas and hard-drive copies does not change the basic nature of its service.

The Second Circuit went astray in its decision below by focusing on only a particular component of Aereo's retransmissions. Rather than considering the service as a whole, the court focused on the last leg of the transmissions, from the hard-drive copy to the user's computer. Because that last leg was available to only one subscriber at the time the hard-drive copy was generated, the court reasoned, Aereo was not transmitting "to the public." Pet. App. 28a-30a.

That myopic focus elevates a technical detail over a common-sense understanding of what Aereo is doing. Aereo is not in the business of transmitting recorded content from individual hard-drive copies to subscribers. Rather, it is in the business of retransmitting broadcast television to subscribers. The "transmission" that Aereo's service offers is the entire chain from Aereo's broadcast content source, through a mini-antenna, through a hard-drive copy, to the subscriber—not merely the last leg of that chain. Aereo's mini-antennas and hard-drive copies should not be viewed as distinct sources of transmissions shorn from the context in which they operate. Rather, they are more sensibly viewed as

mere steps in the "device or process" Aereo uses to hold out and deliver television retransmissions to the public.

Nothing in *Cablevision* forecloses that analysis. *Cablevision* held that "the use of a unique copy may limit the potential audience of a transmission and is therefore *relevant* to whether that transmission is made 'to the public.'" 536 F.3d at 138 (emphasis added). That does not mean that *any* individual hard-drive copy automatically makes a performance private. It simply means that courts should consider such copies in the context of the overall transmission system in determining whether a service offers transmissions "to the public."

Aereo's system differs fundamentally from the RS-DVR. The RS-DVR is a separate service distinct from Cablevision's underlying delivery of cable programming. A subscriber using the RS-DVR understands he is not merely watching television—he is using a recording-and-playback technology to record a program and then play back the recording he made at a more convenient time, just as he would with a VCR or set-top DVR. Cablevision offered cable service long before it developed the RS-DVR, and it continues to offer that service separately to subscribers who do not want to pay for the RS-DVR. Subscribers who want to record programs for later viewing have many options besides the RS-DVR, such as set-top DVRs, TiVos, and even old-fashioned VCRs.

Given those facts, it makes sense to view RS-DVR playback transmissions as distinct transmissions rather than mere links in the chain by which Cablevision delivers television programming to cable subscribers. RS-DVR transmissions are not a mere "device or process" for retransmitting broadcast television; they are part of a distinct recording-and-playback service. Accordingly, the potential audience for those transmissions should be judged by looking to who is "capable of receiving" transmissions from particular recordings on the RS-DVR, not

who is "capable of receiving" transmissions over Cablevision's cable system generally. And because each RS-DVR recording is available for playback only to the particular subscriber who made the recording, those transmissions are not "to the public."

C. Mere Enabling of DVR Functionality Does Not Make Performances Private

Aereo contends that its individual hard-drive copies perform the same function as the RS-DVR recordings in *Cablevision* because they enable Aereo to offer DVR functionality such as pause or rewind. That comparison is unpersuasive.

Cablevision offers two distinct services: A licensed cable retransmission service and a distinct recording-and-playback service. Cablevision does not rely on the separate RS-DVR recordings to justify the lawfulness of its underlying retransmission service. It has no need to, because the retransmission service is licensed. Instead, Cablevision relies on the separate recordings to justify only the lawfulness of the RS-DVR itself.

Aereo, by contrast, is not relying on its separate hard-drive copies merely to justify the lawfulness of its pause, rewind, and record functions. It is relying on those copies to justify the *entire television retransmission service*. It is doing so even in the many cases where subscribers are *not even using* the pause, rewind, or record functions but are merely watching television live.

That Aereo's separate hard-drive copies enable pause, rewind, and record functions may prove that those copies are not a total sham. But that is not the test. The relevant question is whether, in the context of *the system whose lawfulness is at issue*, the transmissions from the separate copies are better viewed as distinct transmissions or as mere links in a chain in some longer transmission. In *Cablevision*, the separate subscriber-made re-

cordings were utterly central to the system whose lawfulness was at issue—which was, after all, a *recording*-and-playback system. In that context, it made sense to treat the playback transmissions as distinct rather than mere links in a chain, and to analyze the potential audience for the playback transmissions from each separate recording.

Aereo's hard-drive copies, by contrast, are wholly collateral to its television retransmission service. "The core of Aereo's business is streaming broadcasts over the Internet in real-time; the addition of the record function * * * cannot legitimize the unauthorized retransmission of copyrighted content." Pet. App. 52a (Chin, J., dissenting). The seven-second buffer Aereo inserted into its transmission streams to enable DVR functionality is not meaningfully different from a fifteen-second buffer inserted to enable quality assurance review or a five-second buffer inserted to enable reformatting. There may be valid reasons to insert all those separate copies, but none of them changes the basic fact that Aereo is retransmitting television programming to the public. In that context, it makes sense to view the hard-drive copies as mere steps in the transmission process and to consider the potential audience for the transmissions as a whole, not merely their final legs.

CONCLUSION

The Second Circuit's judgment should be reversed.

Respectfully submitted.

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