

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 *AMICI CURIAE* SMALL
AND INDEPENDENT BROADCASTERS
IN SUPPORT OF RESPONDENT**

—◆—
JASON M. SCHULTZ
(Counsel of Record)
NYU TECHNOLOGY LAW AND POLICY CLINIC
NYU SCHOOL OF LAW
245 Sullivan Street, 609
New York, NY 10012
Telephone: (212) 992-7365
jason.schultz@exchange.law.nyu.edu

*Counsel for Amici Curiae Small
and Independent Broadcasters*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	5
ARGUMENT.....	8
I. Introduction	8
II. Aereo Facilitates Small and Independent Broadcasters in Furthering the Policies Underlying Copyright Law.....	10
A. Aereo Enables Small and Independent Broadcasters to Reach More Viewers, Making Broadcast Content More Accessible.....	10
B. Aereo Encourages Small and Independent Broadcasters to Produce Diverse Content Aimed at Audiences Major Broadcast Providers Often Ignore	13
C. Aereo Allows Small and Independent Broadcasters to Take Advantage of Technological Innovation in Order to Capitalize on Changing Viewership Trends	19
III. The Court Should Interpret the Transmit Clause to Advance Copyright’s Purposes, Which Are Furthered by Allowing Viewers Access to Small and Independent Broadcaster Programming	21

TABLE OF CONTENTS – Continued

	Page
A. Classifying Aereo’s System as Enabling a Private Performance Serves Copyright’s Goal of Increasing Viewer Autonomy and Choice	22
B. Classifying Aereo’s System as Enabling a Private Performance Furthers Copyright’s Goal of Increasing Innovation ...	25
CONCLUSION.....	29
APPENDIX	
<i>AMICI CURIAE</i> SIGNATORIES	App. 1

TABLE OF AUTHORITIES

Page

CASES

<i>Cartoon Network, LP v. CSC Holdings, Inc.</i> (<i>Cablevision</i>), 536 F.3d 121 (2d Cir. 2008)	24
<i>FCC v. Nat'l Citizens Comm. for Broad.</i> , 436 U.S. 775 (1978).....	15
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968).....	21, 28
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	28
<i>Sony Corp. of Am. v. Universal City Studios, Inc. (Betamax)</i> , 464 U.S. 417 (1984).....	7, 23, 24, 28
<i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994).....	14
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975).....	21, 22, 23, 28
<i>Wall v. Taylor</i> , 11 Q.B.D. 102 (1883) (Brett, M.R.)	23

CONSTITUTIONAL AUTHORITIES

U.S. Const. art. I, § 8, cl. 8	22
--------------------------------------	----

STATUTES AND REGULATIONS

17 U.S.C. § 106 (2012)	21
47 U.S.C. § 534(h)(2) (2006)	11
47 C.F.R. § 76.56(b)(3) (2013)	11, 12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

<i>2013 Grambling State Tigers football team</i> , Wikipedia (Mar. 10, 2014), http://bit.ly/1guvoB2	18
<i>ADS, Wired-Cable and Over-The-Air Penetration by DMA</i> , TVB, http://bit.ly/1o5e1e9 (last visited Mar. 24, 2014)	20
Brief for Petitioner, <i>Am. Broad. Cos. v. Aereo, Inc.</i> , No. 13-461 (U.S. Feb. 24, 2014).....	25
<i>Census 2010 Hmong Population Data Tables</i> , Hmong National Development, Inc. (Mar. 5, 2014), http://bit.ly/1h23XgC	15
David Kordus, <i>What’s on (Digital) TV? Assessing the Digital Television Broadcasting System, its Potential and its Performance in Increasing Media Content Diversity</i> , 19 <i>Comm. L. & Pol’y</i> 55 (2014).....	14
Eric Klinenberg, <i>Fighting for Air: The Battle to Control America’s Media</i> (2007)	14
FCC, <i>Consumer Guide: Low Power Television (LPTV) Service 1</i> (2014), http://bit.ly/1kYfuyj	11
<i>Hmong people</i> , Wikipedia (Mar. 5, 2014), http://bit.ly/1eFL00X	15
<i>How to Watch</i> , WKRP.tv, http://bit.ly/1fYGb0E (last visited Mar. 25, 2014)	20
Joshua M. Greenberg, <i>From Betamax to Blockbuster: Video Stores and the Invention of Movies on Video</i> (2010).....	27

TABLE OF AUTHORITIES – Continued

	Page
Karl A. Groskaufmanis, <i>What Films We May Watch: Videotape Distribution and the First Amendment</i> , 136 U. Penn. L. Rev. 1263 (1988).....	27
Leonard M. Baynes, <i>Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color</i> , 39 U. Mich. J. L. Reform 199 (2006)	14
Lloyd Grove, <i>Sheila Johnson Slams BET</i> , The Daily Beast (Apr. 29, 2010), http://thebea.st/Q95doZ	16
<i>Local Television Market Universe Estimates</i> , Nielsen (Sept. 22, 2012), http://bit.ly/Q85ngn	20
Mark Schlabach, <i>HBCU guarantee money could dry up</i> , ESPN (Feb. 20, 2014), http://es.pn/1c51YFK	18
<i>NABOB's Objectives</i> , National Association of Black Owned Broadcasters, http://bit.ly/1jT1vs2 (last visited Mar. 27, 2014)	16
Nat'l Ass'n of Broads., <i>About NAB</i> , NAB.org, http://bit.ly/1gSb1Z0	12
Nat'l Ass'n of Broads., <i>NAB Bylaws art. 4, § 2</i> , NAB.org, http://bit.ly/1gSb1Z0	12
Randal C. Picker, <i>Our Chance to Reset TV Distribution</i> , OZY (Mar. 14, 2014), http://bit.ly/1dnJovT	19

TABLE OF AUTHORITIES – Continued

	Page
Sabrina Tavernise & Robert Gebeloff, <i>Many U.S. Blacks Moving to South, Reversing Trend</i> , N.Y. Times (Mar. 24, 2011), http://nyti.ms/1pdb88h	17
U.S. Census Bureau, <i>Reported Internet Usage for Individuals 3 Years and Older, by State: 2012</i> , available at http://1.usa.gov/1roWVHl (last visited Mar. 24, 2014).....	20

INTEREST OF *AMICI CURIAE*¹

Amici are small and independent broadcasters who strive to expand their viewing audiences in myriad ways to promote the content they create and carry. As such, these broadcasters have strong interests in the proper interpretation of the “Transmit Clause” of the Copyright Act’s public performance right and preservation of the scope of the private performance as an area outside of the exclusive rights of copyright owners. These interests include the promotion of innovative Internet platform technologies, such as Aereo, which allow millions of viewers to initiate the recording and private viewing of broadcast content via remote antenna, digital video recorder (DVR), and mobile and other networked devices. Their interests also include the promotion of private performance as a vehicle for enabling individual audience members to choose the type of content they wish to watch and at what times, especially content not carried by the major network broadcasters, cable, or satellite companies.

Amicus Block Broadcasting Company (Elliott Block, Chief Executive Officer & General Manager)

¹ In accordance with S. Ct. R. 37.3(a), all parties have consented to the filing of this brief. The Petitioner and Respondents have filed consent letters with the Clerk. Pursuant to S. Ct. R. 37.6, counsel for *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

owns and operates the local station WKRP in Cincinnati, Ohio. WKRP currently airs content on six low-power stations ranging from Cozi TV, which generally features classic 1970s television programming but also airs Northern Kentucky University men's and women's basketball games, to America One, a station offering outdoors and lifestyle programming. This station has been broadcasting to the Cincinnati market (at times under different call numbers) for almost 25 years.

Amicus Cocola Broadcasting Companies (Gary Cocola, President & Chief Executive Officer) is an independent television broadcaster in the Fresno, California area. Cocola Broadcasting airs 33 streams of video, making it the largest single provider of video content in the Fresno area. These 33 stations include one full-power station that is carried on satellite, but are primarily low-power stations and mostly available only via an antenna and not through cable or satellite. Cocola's stations range from Hmong TV, which offers locally-produced programming in the Hmong language, to TV Scout Guide, a station airing the programming grid, which has become commonplace on cable and satellite, but is increasingly important to over-the-air broadcast viewers as printed television programming guides have decreased in popularity.

Amicus LeSEA Broadcasting Corporation (Peter Sumrall, President & Chief Executive Officer) is an independent television broadcaster operating a total of six domestic stations in Colorado, Oklahoma,

Indiana, Hawaii, and Louisiana. As a Christian broadcaster, LeSEA seeks to provide an alternative to secular television programming in each of its markets. It does so by producing and airing original faith-based programming such as its award-winning “The Harvest Show,” one of the highest-rated Christian genre programs, and “Live From Studio B,” which features popular Christian music artists and groups. LeSEA also airs local sports and other community programming on many of its stations. LeSEA’s primary channels have at least some satellite or cable carriage, but none of its digital subchannels have any cable carriage.

Amicus Mako Communications, LLC (Howard Mintz, Owner & General Manager) is a family owned and operated business headquartered in Corpus Christi, Texas. Since 2000, Mako Communications has been in the business of acquiring, building, and maintaining 42 Class A and low power television stations across the United States, including Puerto Rico and 16 of the top 50 broadcast markets. Mako Communications’ low power stations (a) serve a number of diverse and underserved communities by carrying network programming, such as Soul of the South Television, that is geared towards households that rely exclusively on free-over-the-air broadcast television, and (b) has found that, in total, minority households make up 44 percent of all broadcast-only homes and that these numbers are growing.

Amicus Soul of the South Television (Christopher R. Clark, Esq., Executive Vice President of Business

and Legal Affairs) is a super-regional television network dedicated to covering the events, lifestyles, and culture of African American Southerners. Soul of the South features a mix of news, dramas, comedies, feature films, court shows, music, documentaries, and Southern sports. These programs reflect the history, vitality, and institutions of the South and the critical role African American Southerners played in building our country. Soul of the South also focuses on the lives of Southerners in the North and their influence. In addition to being carried on both full-power and low-power stations throughout the South and major cities in the North, Soul of the South will also own and operate two full-power stations in Little Rock, Arkansas and Mobile, Alabama. Viewers can currently use Aereo to watch Soul of the South programming in Dallas, Texas and will be able to do so in other markets as the network expands.

Amicus WatchTV, Inc. (Gregory J. Herman, President) operates both Class A and low-power television facilities. WatchTV was the first television broadcaster to provide foreign language programming in the State of Oregon and has established itself as a leader in the development and deployment of forward thinking, innovative, and efficient uses of technology for broadcasters.

Amici represent neither party in this action and offer the following views on this matter.



SUMMARY OF ARGUMENT

Contrary to Petitioners' assertions, not all broadcasters oppose Aereo's platform for enabling individual audience members to use an antenna to initiate their own recording and reception of over-the-air programming for personal viewing. In fact, many small and independent broadcasters (SIBs) depend heavily on such user-friendly viewing technologies to reach their audiences, especially audiences that cannot afford home viewing equipment, cable, or satellite television, audiences who only watch broadcast content via mobile networks or the Internet, or audiences who may not be technologically sophisticated enough to set up their own antenna, digital receiver, or digital video recorder, and configure their own mobile devices. In addition to furthering technological innovation, platforms such as Aereo provide cost-efficient ways for SIBs to expand their viewing audiences and maximize their content offerings, all in line with the goals of the Copyright Act of 1976.

SIBs play a unique role for today's television audiences by disseminating diverse content that is commonly overlooked by larger television providers. As the Court decides whether Aereo's technology enables a private or public performance, it should take into account the important role that SIBs play and the needs of the audiences they serve. For example, *Amicus* Cocola Broadcasting in Fresno, California plays a key role in providing specialized content to Fresno's sizable Hmong population – content that Petitioners fail to provide. The Hmong, an ethnic

group from Southeast Asia that came to the United States in large part to flee persecution, continue to speak their native language. Despite the large Hmong population in Fresno, the major network broadcasters, cable, and satellite providers in the region do not carry Hmong-language content. One of Cocola's local stations, however, not only carries Hmong-language programming, but also content created by Fresno-area Hmong producers. Hmong programming can currently only be seen over the air via Cocola's independent broadcast towers. Yet not every viewer interested in Hmong programming has an antenna in their home. Were Aereo's innovative platform available in Fresno, any interested viewer could choose to tune an Aereo antenna to one of Cocola's stations, make a recording, and privately watch that program on her mobile or networked device. Such technologies provide for a dramatic expansion of the potential audience for such unique content.

Also contrary to Petitioners' assertion of harm, certain broadcasters – namely *Amici* SIBs – feel that technologies such as Aereo improve their financial outlook by helping to disseminate diverse content and to take advantage of changing trends in viewership. By enabling audience members to initiate a recording of over-the-air television by antenna and view it via the Internet, Aereo enables individual audience members who are not currently receiving SIB content to find it, record it, and watch it. For example, once Aereo became available in Cincinnati, Ohio, small broadcaster WKRP began actively promoting the use

of Aereo to expand viewership and increase interest among viewers who were otherwise unable to receive WKRP's signal clearly. This type of viewer access is particularly important for economically challenged viewers who cannot afford both Internet and expensive home viewing equipment, cable or satellite subscriptions.

Copyright's "public" versus "private" distinction seeks to advance certain goals associated with copyright law – that is, broad dissemination of and access to diverse creative content, increased innovation, and individual viewer autonomy. It is important that the Court consider these underlying goals and their relationship to SIBs in interpreting the statutory language, "to perform a work 'publicly,'" so that the Court's application is aligned with the spirit of the Copyright Act.

In 1984, this Court held that Sony was not liable for contributory infringement because its Betamax video recording-and-playback technology enabled and expanded private home viewing capabilities for the public at large. *Sony Corp. of Am. v. Universal City Studios, Inc. (Betamax)*, 464 U.S. 417, 454 (1984). The broadcast television industry faces a similar moment in time with a different new technology: Aereo. Similar to the Betamax, Aereo also expands the audience for private television viewing, not only of major broadcaster Petitioners but also of *Amici* SIBs. For all of the above reasons, this Court should find that Aereo enables individual audience members to initiate

private recordings and viewings that further important purposes of copyright law.



ARGUMENT

I. Introduction

Amici small and independent broadcasters (SIBs) have accepted a basic bargain: In return for their right to broadcast freely over the public airwaves, consumers have the reciprocal right to use an antenna to access their over-the-air broadcasts, and to make personal recordings of the broadcast programs, without license or payment. But Petitioners have reneged on this bargain, believing that in addition to being given access to the over-the-air broadcast spectrum, they are entitled to control how and when individual audience members tune the antennas that receive their transmissions for private recording and viewing. This perspective emanates from an attempt to use the cable and satellite models from the 1960s and 1970s as a blueprint for the norm for the future of television programming distribution. But we live in a very different world today. Due to profound advances in Internet and mobile networks, television audiences in the twenty-first century have far more choices for how they can privately view programming, especially broadcast content. In fact, every day, more viewers choose not to subscribe to either cable or satellite in order to receive broadcast content, but rather to use their Internet or mobile networks to provide

such access. And while Petitioners claim that private viewing platforms such as Aereo are antithetical to the business of broadcasting, this is far from the truth, and far from the perspective of *Amici*.

Amici SIBs represent a broad and diverse array of companies and individuals who welcome these new technologies as a means of expanding their audiences and providing individual audience members with better, easier, and more diverse choices for their private broadcast viewing. SIBs deliver a wealth of unique, high-quality television programs that are not generally offered by Petitioners' networks, cable, or satellite providers, which makes them critical to the furtherance of the policies underlying copyright law for the broadcast television industry. When reaching out to new audiences, especially those who rely heavily, or even exclusively, on the Internet and mobile networks to privately watch television programming, SIBs look to innovative platforms such as Aereo to level the playing field. Because their programming is most often only broadcast to viewers over the air via an antenna, SIBs see Aereo as a modern and easier way to empower the viewing public to watch over-the-air programming, which has always been their right. This Court should take into account the important role that SIBs play and the needs of the audiences they serve in determining whether Aereo's technology violates the Copyright Act.

II. Aereo Facilitates Small and Independent Broadcasters in Furthering the Policies Underlying Copyright Law.

SIBs play a unique role in the modern television industry. Large television producers and distributors generally do not cater their programming to the needs of smaller, diverse audiences. SIBs fill the void that is left by producing and distributing diverse content aimed at heterogeneous audiences. The structural disadvantages faced by these broadcasters, however, limit how widely they can distribute their content and impede their overall viability. By making it easier for audiences to view over-the-air television, Aereo has the potential to reverse this dynamic. This technology lowers transaction costs and could vastly expand the audiences for SIB content. If the Court allows large broadcasters to control technological platforms such as Aereo, SIBs will continue to struggle to disseminate their content. This will disproportionately harm audiences that are currently being underserved.

A. Aereo Enables Small and Independent Broadcasters to Reach More Viewers, Making Broadcast Content More Accessible.

Contrary to what Petitioners argue, Aereo's technology is helping, not hurting, many broadcasters – namely, smaller, independent, often low-powered broadcasters – in their efforts to disseminate diverse content and to take advantage of changing trends in

viewership. SIBs often offer unique or localized content because they are operated by diverse groups, individuals, or organizations (e.g., large and small businesses – sometimes with specific missions – individual citizens, religious groups, and educational institutions). See FCC, *Consumer Guide: Low Power Television (LPTV) Service 1* (2014), <http://bit.ly/1kYfuyj>. These diverse broadcasters contribute significantly to furthering the goals of copyright law by broadly promoting public availability of unique works of art.

SIBs have a long history of structural disadvantage compared with national, network broadcasters and cable or satellite companies. Many examples illustrate this David versus Goliath narrative. Most fundamentally, almost all low-power broadcasters neither benefit from the “must-carry” requirements that full-power broadcasters enjoy, nor have required retransmission consent negotiations. Certain low-power stations can qualify for must-carry status under § 614(h)(2) of the Communications Act of 1934, 47 U.S.C. § 534(h)(2) (2006), if they meet a series of stringent requirements laid out in the associated federal regulations, 47 C.F.R. § 76.56(b)(3) (2013).²

² To obtain “must-carry” status, the federal regulations require that a station broadcast for a minimum number of hours, meet all obligations and requirements of full-power stations with respect to certain issues, comply with interference regulations, be located not more than 35 miles from the cable system’s principal headend, and deliver a good quality signal, and that the community served by the station be located outside of the largest 160 Metropolitan Statistical Areas as determined by the

(Continued on following page)

Unsurprisingly, not many low-power stations meet those qualifications. As a result, they must rely on other methods for obtaining carriage or retransmission of their programming: barter, time brokerage, good faith, or advertising insertion. These methods require more effort and capital than must-carry and are much less successful.³ In order to overcome these disadvantages, SIBs need ways to make their broadcast streams more widely available to the public. Technologies such as Aereo, which allow individual audience members to use an antenna and recording system to expand availability of broadcast programming, assist SIBs in achieving increased access to creative expression, a fundamental goal of copyright law.

Naturally, Petitioners will argue that they have no objection to Aereo facilitating access to *Amici's* content and merely want to stop Aereo from facilitating access to Petitioners' own content. But Petitioners' argument mischaracterizes this case as one about

Office of Management and Budget and not be served by a full-power television station. 47 C.F.R. § 76.56(b)(3).

³ Another example of the disenfranchisement of SIBs is their treatment by the National Association of Broadcasters (NAB), the self-described "voice for the nation's radio and television broadcasters" and "premier trade association for broadcasters." Nat'l Ass'n of Broads., *About NAB*, NAB.org, <http://bit.ly/1gSb1Z0>. Low-power broadcasters can only become "Associate Members" of the NAB as opposed to "Active Members," which means they have no right to vote. See Nat'l Ass'n of Broads., *NAB Bylaws* art. 4, § 2, NAB.org, <http://bit.ly/1gSb1Z0>.

broadcasters instead of one about the broadcast audience and their private viewing choices. Aereo does not level the playing field for direct broadcasting; rather, it levels the playing field for the viewing audience, so that they can simply and efficiently choose from a more diverse array of content for private viewing. Petitioners' arguments, if successful, transform the act of a viewer choosing which free-to-air broadcast he or she wishes to watch privately into a public performance by Aereo, which Petitioners could then control. Allowing Petitioners to control these private performances would result in the most dominant broadcasters shaping the future of this vibrant new area of technology, with the most likely result being a lack of innovation, experimentation, and diverse content offerings and an expansion of their already-dominant proprietary and highly concentrated distribution mechanisms. This would shut down almost any private viewing platforms that use the Internet, one of the few new and viable avenues for SIBs to expand their viewing audiences.

B. Aereo Encourages Small and Independent Broadcasters to Produce Diverse Content Aimed at Audiences Major Broadcast Providers Often Ignore.

“[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order [because] the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the

public.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (internal citations and quotations omitted). SIBs, by the nature of their role in the broadcast industry, are able to further this goal. Cable and satellite providers have bandwidth limitations that restrict how much programming they can transmit, requiring them to be selective when choosing what content to carry. See David Kordus, *What’s on (Digital) TV? Assessing the Digital Television Broadcasting System, its Potential and its Performance in Increasing Media Content Diversity*, 19 Comm. L. & Pol’y 55, 66 (2014). These providers must ensure that the content they carry has a sufficiently large audience so as to justify its place on their crowded transmissions. As a result, majoritarian tastes drive programming decisions while minority groups are ignored. See Leonard M. Baynes, *Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color*, 39 U. Mich. J. L. Reform 199, 207-208 (2006) (finding that the major television networks “fail to provide sufficient diversity” despite their best efforts).

Media consolidation has exacerbated this dynamic by further reducing the number of diverse voices in the marketplace; as television providers have grown in size and dwindled in number, their focus has moved further away from content aimed at local audiences. See Eric Klinenberg, *Fighting for Air: The Battle to Control America’s Media* 26 (2007) (“[M]edia conglomerates have devastated locally produced newspapers, television stations, and

radio programs throughout the country.”); *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (“In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints. . . .”). SIBs, however, are better able to tailor their programming to meet these niche markets because they have easier bandwidth constraints and lower operation costs.

SIBs accomplish this in several ways. First, they provide opportunities to produce and distribute content that reflects the experiences and cultures of underrepresented racial and ethnic minorities. For example, the Fresno, California metro area is home to the country’s second largest Hmong population. *Census 2010 Hmong Population Data Tables*, Hmong National Development, Inc. (Mar. 5, 2014), <http://bit.ly/1h23XgC>. The Hmong are an ethnic group from the mountainous regions of Southeast Asia, many of whom settled in the United States as refugees following the Communist takeover of Laos. *Hmong people*, Wikipedia (Mar. 5, 2014), <http://bit.ly/1eFL00X>. This now well-established community produces television content in their own language, which *Amicus Cocola Broadcasting* carries in the Fresno area. Despite this significant market, neither cable nor satellite carries Hmong programming in Fresno because providers fail to devote bandwidth to hyper-local content. Thus, the only way for television viewers to access Hmong programming is via Cocola’s over-the-air television.

Yet because Cocola is a SIB, its broadcast towers can only reach limited geographic areas. Mobile and networked platforms such as Aereo remove much of the limitation, enabling many additional viewers to choose to record and watch Hmong programming as an alternative to the more dominant national broadcast content.

This trend is not limited to language minorities or recent immigrant communities. Historically, there have been relatively few television networks dedicated to producing content for the African American community. See *NABOB's Objectives*, National Association of Black Owned Broadcasters, <http://bit.ly/1jT1vs2> (last visited Mar. 27, 2014) (“Although constituting 14% of the total population, African-Americans own approximately 2% of all commercial broadcast licenses in the United States.”). The few networks that have been established, such as Black Entertainment Television (BET), have generally not developed content that addresses the diversity of the African American community. In fact, following its acquisition by a large media corporation, BET largely abandoned its original public-minded programmatic focus. See also Lloyd Grove, *Sheila Johnson Slams BET*, *The Daily Beast* (Apr. 29, 2010), <http://thebea.st/Q95doZ> (reporting that Johnson, the co-founder of BET, is ashamed of how the network has strayed from its original mission of providing a variety of public affairs programming). BET has also largely overlooked the experiences of Southern African Americans, despite the fact that nearly two-thirds of

African Americans reside in the South. *See* Sabrina Tavernise & Robert Gebeloff, *Many U.S. Blacks Moving to South, Reversing Trend*, N.Y. Times (Mar. 24, 2011), <http://nyti.ms/1pdb88h>.

By lowering barriers to entry, antennas and DVRs accessible via the Internet can expand private viewing to help fill this gap in reaching an important but underserved audience. For example, Soul of the South Television, a start-up regional broadcaster, was created with the goal of producing content that directly represents the values and experiences of Southern African Americans. Since its founding in 2011, Soul of the South has established eleven affiliates in addition to the two stations it owns. Its ability to quickly expand is a testament to the demand for such content. However, such start-up broadcasters typically have a difficult time convincing cable or satellite to carry their niche content, therefore limiting their ability to reach all relevant audiences. Aereo and other means of Internet-enabled private viewing help overcome these barriers and provide more individual audience members with the capability to choose non-mainstream programming, such as the type Soul of the South Network provides. *See infra* Part II.C. It is no surprise, therefore, that Soul of the South is already taking advantage of the benefits Aereo provides; viewers in Dallas, Texas can currently use the platform to record and watch Soul of the South programming. As the network expands to other markets in which Aereo is available, Soul of the South plans to continue using Aereo to reach more viewers.

A dearth of diverse television content can have dire consequences. For example, small market sports teams such as Grambling State University Football struggle to stay competitive if they cannot gain access to a television audience. This historically black university's football team has a proud tradition – Eddie Robinson, the long-time coach, has the second most wins in the history of Division I college football – and yet suffers from a lack of resources, a situation that is not uncommon for smaller, historically black colleges. Mark Schlabach, *HBCU guarantee money could dry up*, ESPN (Feb. 20, 2014), <http://es.pn/1c51YFK>. This past Fall, negative conditions escalated to such a level that the football team refused to play a game in protest. It is no coincidence that the team has only played one game on a major television network. *2013 Grambling State Tigers football team*, Wikipedia (Mar. 10, 2014), <http://bit.ly/1guvoB2>. Because large television providers have consistently passed over small schools, many are turning to local broadcasters to help them reach audiences. Schlabach, *supra*. While not a cure-all, SIBs can help teams generate ratings, which ultimately increases ticket sales and sponsorships and helps to recruit other student athletes. Add to this the power of Internet-accessible antennas, DVRs and private viewing, and small school football fans of all backgrounds would be able to generate ever greater waves of support for their favorite teams.

C. Aereo Allows Small and Independent Broadcasters to Take Advantage of Technological Innovation in Order to Capitalize on Changing Viewership Trends.

As discussed in Part II.B, SIBs play a vital role in providing access to programming aimed at diverse audiences, but the niche appeal of such content often means that these broadcasters struggle to obtain carriage on cable or satellite systems. Without the ability to transmit over cable or satellite, SIBs are shut out of the vast majority of households in their designated market areas (DMA) because they can only reach households that have equipment in their homes that enables receiving over-the-air television. Because cable or satellite packages often include only the largest over-the-air broadcast networks, but not SIBs, households that subscribe to such services will not bother to install an antenna and will not receive SIB programming.

Aereo upends this dynamic by allowing SIBs to reach Internet and mobile network users, provided viewers initiate recordings through its remote antennas. See Randal C. Picker, *Our Chance to Reset TV Distribution*, OZY (Mar. 14, 2014), <http://bit.ly/1dnJovT>. Instead of being limited to the segment of the market that watches over-the-air television via an antenna at home, SIBs could reach nearly every household and consumer with Internet access otherwise capable of receiving their over-the-air signal. The potential expansion in viewership for SIBs is

enormous. For example, the San Francisco/San Jose DMA has approximately 2.5 million television homes. *Local Television Market Universe Estimates*, Nielsen (Sept. 22, 2012), <http://bit.ly/Q85ngn>. However, only seven percent of households watch television over the air, *ADS, Wired-Cable and Over-The-Air Penetration by DMA*, TVB, <http://bit.ly/1o5e1e9> (last visited Mar. 24, 2014), meaning most of the area's local SIBs cannot reach over 90 percent of the television-viewing market. If Aereo operated in San Francisco, over-the-air broadcasters could potentially reach all Internet users in the DMA, a number calculated at close to 80 percent of the market. See U.S. Census Bureau, *Reported Internet Usage for Individuals 3 Years and Older, by State: 2012*, available at <http://1.usa.gov/1roWVHI> (last visited Mar. 24, 2014) (reporting that 81.3 percent of Californians lived in a household with Internet access). Tapping Internet users could amount to more than ten times SIBs' current market share. This potential for dramatic expansion in viewership is an important reason why SIBs such as WKRP in Cincinnati eagerly promote Aereo as a way to watch their content. See *How to Watch*, WKRP.tv, <http://bit.ly/1fYGB0E> (last visited Mar. 25, 2014).

III. The Court Should Interpret the Transmit Clause to Advance Copyright’s Purposes, Which Are Furthered by Allowing Viewers Access to Small and Independent Broadcaster Programming.

Congress has never given copyright holders the right to control every aspect of the performance of their works. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154-55 (1975); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393-94 (1968) (“The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several ‘rights’ that are made ‘exclusive’ to the holder of the copyright.”). Congress, in enacting the Copyright Act of 1976 pursuant to its constitutional authority, specifically enumerated certain limited rights granted to the copyright holder. 17 U.S.C. § 106 (2012) (guaranteeing the rights of reproduction, distribution, public performance, public display, digital audio transmission, and preparation of derivative works). Any right not explicitly granted to the copyright holder by statute is preserved for the public. *See Aiken*, 422 U.S. at 155; *Fortnightly*, 392 U.S. at 394-95 (“If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these ‘exclusive rights,’ he infringes the copyright. If he puts the work to a use not enumerated . . . *he does not infringe.*”) (emphasis added). This limitation on exclusive rights granted to the copyright holder is in accordance with the underlying goal of the Copyright

Clause: to promote progress. *See* U.S. Const. art. I, § 8, cl. 8. Promotion of progress requires striking a delicate balance between protecting authors' interests in their works and encouraging diverse, innovative creation. In service of that goal, activities falling outside of the statutorily granted exclusive rights belong to the public, regardless of whether the work is the subject of a specific exemption or limitation otherwise found in the Copyright Act.

A. Classifying Aereo's System as Enabling a Private Performance Serves Copyright's Goal of Increasing Viewer Autonomy and Choice.

As this Court explained in *Aiken*, "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts," *Aiken*, 422 U.S. at 156, a cause that SIBs also champion. Differentiating between "public" and "private" performances advances certain underlying goals of copyright law. By reserving some performances – those that are "private" – of copyrighted works for individual viewers to choose and even initiate, the Act ultimately increases broad dissemination of and access to diverse creative content. Individuals are not limited to viewing only performances that are initiated by the copyright holder, but are empowered to initiate their own performances so that they can view content in private spheres without concern for infringing upon an author's copyright.

This allows viewers to participate in the copyright system as legitimate actors, electing and exploring content from the mainstream dominant broadcaster to the small, independent, or local one.

The autonomy to choose programming that enriches the lives of oneself and one's family members was considered positively by this Court in the *Betamax* case. See *Betamax*, 464 U.S. at 445 n.27. The Court quoted testimony from Fred Rogers, renowned creator and host of the popular children's television program *Mister Rogers' Neighborhood*, asserting distaste for people's viewing habits being "programmed by others" – "My whole approach in broadcasting has always been 'You are an important person just the way you are. You can make healthy decisions' . . . I just feel that anything that allows a person to be more active in the control of his or her life, in a healthy way, is important." *Id.* SIBs, similarly, do not seek to foist their programming upon audiences, but merely to offer their content to audiences as a viable and valuable option.

Copyright owners should not be able to control what people watch privately. Copyright law has repeatedly affirmed that there is a private sphere within which no infringement upon the exclusive performance rights of copyright holders can occur. See *Aiken*, 422 U.S. at 155 (citing *Wall v. Taylor*, 11 Q.B.D. 102, 106-07 (1883) (Brett, M.R.)) ("[I]f an unlicensed use of a copyrighted work does not conflict with an 'exclusive' right conferred by the statute, it is no infringement of the holder's rights. No license is

required by the Copyright Act, for example, to sing a copyrighted lyric in the shower.”). This private sphere is crucial to furthering the goals of copyright law. Returning to the subject of the Sony Betamax, when suit was brought against Sony by television programmers for contributory copyright infringement stemming from private viewers’ recording and time-shifting, this Court found that time-shifting in the private sphere furthered copyright’s purpose of expanding television viewing audiences. *Betamax*, 464 U.S. at 449. In *Cablevision*, the Second Circuit established that the private sphere does not exist exclusively for time-shifted programming, but also applies to live viewing, and is not confined to our twentieth century notions of domesticity as the sine qua non of private life. *Cartoon Network, LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121, 138 (2d Cir. 2008). Copyright owners cannot invade, license, or control that sphere; the private, non-commercial viewing choices of users are not within the ambit of copyright owners’ control.

Were Petitioners to wield control over technologies such as Aereo, viewers who rely on Internet-enabled devices to view broadcast content would suffer, because they would have fewer choices. Viewer choice is especially important for those audience members who choose to go “against the mainstream” with their viewing selections. Anti-mainstream options, such as SIB programming, may not be available to viewers if parties such as Petitioners control all content. In this sense, the protected sphere of private

performances serves as a proxy for shielding the rights of viewers to choose what they watch without interference from broadcasters. If all user-initiated recordings accessed over the Internet via widely-available platforms were deemed “public” performances, broadcasters would gain control of this activity in ways that have never been allocated to them by Congress. Copyright law was never intended to allow rights holders to dictate how and when individuals could consume copyrighted content and what content they could consume.

B. Classifying Aereo’s System as Enabling a Private Performance Furthers Copyright’s Goal of Increasing Innovation.

Under Petitioners’ interpretation of the Transmit Clause, essentially all performances transmitted over the Internet would be classified as “public” – even those performances initiated by viewers themselves of free-to-air programming received by antenna, recorded, and played back – as long as some unlicensed service provider was involved in the technological process of the private viewing of the material. This would give Petitioners the power to control viewers’ choices of broadcast content. *See* Brief for Petitioner at 23-25, *Am. Broad. Cos. v. Aereo, Inc.*, No. 13-461 (U.S. Feb. 24, 2014). This would be disastrous for *Amici* SIBs, because it would destroy much-needed experimentation and innovation in online viewing platforms – innovation that *Amici* need to compete

with the much larger Petitioners. If the public performance right could be infringed upon by a mere link between a commercial service provider and a viewer-initiated recording ultimately viewed on some mobile device, very few, if any, experiments would be undertaken to provide individual viewers with Internet-enabled options for initiating private viewing of broadcast content.

Petitioners, of course, tout their own systems for Internet recording and viewing as the solution to this problem, but this solution only serves to reinforce their dominance in the broadcast market. *Amici* SIBs do not have access to these systems or the resources to build and offer independent systems; rather, they often depend heavily on third-party platforms such as Aereo to reach audiences. This is especially true for reaching those viewers who mainly watch content online or via a mobile device, a trend that is increasing and particularly common among younger audiences today. Waiting for Petitioners to build proprietary systems and then offer access to *Amici* is a pipe dream with serious anti-competitive risks. To allow Petitioners to use copyright law to control the development of such systems threatens to push SIBs even further away from audiences and undermines progress in this area of the useful arts.

By placing private performances beyond the reach of copyright holders, the “public” versus “private” distinction advances innovation by creating a market for private performances and the technologies

that enable them. History has shown that offering lower cost platforms for accessing content can enhance not only access, but also innovation. For example, the introduction of Sony's Betamax, a mechanism for private performance, spurred the creation of videocassettes with prerecorded content. See Joshua M. Greenberg, *From Betamax to Blockbuster: Video Stores and the Invention of Movies on Video 50* (2010) ("Soon after Betamax was unveiled, independent suppliers began to offer their own tapes with prerecorded content for sale."). Independent filmmakers or entrepreneurs, who could afford to make videocassettes but who never could have gotten wide distribution from a large-scale producer, were now able to disseminate their works for primarily private uses by consumers. This technological innovation particularly benefited diverse audiences that had been ignored by larger content producers. See Karl A. Groskaufmanis, *What Films We May Watch: Videotape Distribution and the First Amendment*, 136 U. Penn. L. Rev. 1263, 1285-86 (1988) (noting that the VCR allowed for providing programming to smaller, diverse audiences, which meant that content was tailored for groups such as children, sexual and linguistic minorities, and those with distinctive entertainment interests). The Betamax offered many small producers a less expensive alternative for distribution of their creative works. As a lower cost platform for accessing broadcast content, Aereo could similarly enhance innovation, to the benefit of diverse television-watching communities.

Innovation is an important factor in this Court's copyright jurisprudence. For example, this Court explained that, "when technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose." *Aiken*, 422 U.S. at 156; *see also Fortnightly*, 392 U.S. at 395-96 ("[O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change."). That basic purpose "reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of *promoting broad public availability of literature, music, and the other arts.*" *Aiken*, 422 U.S. at 156 (emphasis added). This Court has held that new technologies must be assessed not only for their potential to infringe copyrights, *see Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005), but also for their potential to further copyright's purposes, *see Betamax*, 464 U.S. at 442-47 (noting that expanding the television audience is a policy that promotes the purposes of copyright and, thus, helps to justify time-shifting as a fair use of Sony's Betamax VTR). A holding that Aereo's system is part of a private performance will do just that, especially for SIBs.



CONCLUSION

Protecting the autonomy of viewers to make independent choices as to what they watch furthers the purpose of the Copyright Act. Aereo empowers viewers to exercise this autonomy by enabling private recording and reception in the digital age. This helps SIBs disseminate their diverse content more broadly, which benefits the public generally by expanding their viewing options. This is particularly true of minority communities, which are often overlooked by larger television providers.

SIBs recognize that Aereo is an opportunity, not a threat, to their business. Affirming that this technology does not violate copyright law will allow audiences, especially diverse audiences, to receive the content they desire in the manner in which they desire, while also empowering SIBs to meet those demands.

Respectfully submitted,

JASON M. SCHULTZ

(Counsel of Record)

NYU TECHNOLOGY LAW AND POLICY CLINIC

NYU SCHOOL OF LAW

245 Sullivan Street, 609

New York, NY 10012

Telephone: (212) 992-7365

jason.schultz@exchange.law.nyu.edu

*Counsel for Amici Curiae Small
and Independent Broadcasters*

APPENDIX: *AMICI CURIAE* SIGNATORIES

Block Broadcasting Company (WKRP TV)
Elliott Block, Chief Executive Officer & General Manager

Cocola Broadcasting Companies
Gary Cocola, President & Chief Executive Officer

LeSEA Broadcasting Corporation
Peter Sumrall, President & Chief Executive Officer

Mako Communications, LLC
Howard Mintz, Owner & General Manager

Soul of the South Television
Christopher R. Clark, Esq., Executive Vice President
of Business and Legal Affairs

WatchTV, Inc.
Gregory J. Herman, President
