No. 06-

IN THE SUPREME COURT OF THE UNITED STATES

EchoStar Communications Corporation, EchoStar Satellite L.L.C, f/k/a EchoStar Satellite Corporation, Satellite Communications Operating Corporation, and DirectSat Corporation,

Petitioners,

v.

CBS Broadcasting Inc., Fox Broadcasting Co., ABC Television Affiliates Association, NBC Television Affiliates, CBS Television Network Affiliates Association, and FBC Television Affiliates Association,

Respondents.

APPLICATION TO RECALL AND STAY THE MANDATE OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PENDING THE FILING AND CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

EchoStar Communications Corporation is a publicly-held company. Satellite Communications Operating Corporation is a direct wholly-owned subsidiary of EchoStar Communications Corporation. EchoStar Satellite LLC, doing business as DISH Network, is a direct wholly-owned subsidiary of EchoStar DBS Corporation, which is an indirect wholly-owned subsidiary of EchoStar Communications Corporation. DirectSat Corporation was an indirect wholly owned subsidiary of EchoStar DBS Corporation, but merged into EchoStar Satellite LLC effective March 12, 1999.

To the Honorable Clarence Thomas, Associate Justice of the United States and Circuit Justice for the Eleventh Circuit:

Petitioners EchoStar Communications Corporation, EchoStar Satellite L.L.C., f/k/a EchoStar Satellite Corporation, Satellite Communications Operating Corporation, and DirectSat Corporation (collectively, "EchoStar") respectfully apply for an order recalling and staying the mandate of the United States Court of Appeals for the Eleventh Circuit in the above-captioned case pending the filing and disposition of a petition for certiorari seeking review of the Eleventh Circuit's judgment.

The petition for certiorari will seek review of the Eleventh Circuit's decision in *CBS Broadcasting Inc.* v. *EchoStar Communications Corp.*, 450 F.3d 505 (11th Cir. 2006). The petition will address an issue of profound national importance lying at the intersection of federal copyright and telecommunications law. In its decision, the Eleventh Circuit interpreted the injunctive relief provisions of the Satellite Home Viewer Act so as to require the district court to issue a permanent nationwide injunction barring Petitioners from retransmitting certain copyrighted television programming to individuals who subscribe to Petitioners' satellite service nationwide.

The judgment of the Eleventh Circuit will have dramatic consequences if not stayed. It will immediately affect the television network programming received by

hundreds of thousands of individuals. Equally important, the Eleventh Circuit's order will go into effect notwithstanding the district court's finding – which was not disturbed on appeal – that Petitioner's current policies comply with the Act and that a more narrowly tailored injunction was the appropriate means to address prior violations. The great disruption caused by the Eleventh Circuit's ruling is thus wholly unnecessary.

The relief that EchoStar seeks in these circumstances is modest: the recall and stay of the Eleventh Circuit's mandate, for what will be a relatively short period of time in the life of an already eight-year-old case, to give this Court an opportunity to consider a question of national importance that affects not just the parties here, but hundreds of thousands of households throughout the country. Respondents cannot show that they will be unduly burdened by the entry of that limited stay. By contrast, in the absence of the stay, EchoStar will suffer irreparable injury and the public interest will be frustrated – factors that weigh in favor of a stay.

The opinions of the Eleventh Circuit (Tab 1) and district court (Tab 2) are attached. Petitioners have exhausted all possibilities of securing a stay of mandate from the Eleventh Circuit.

STATUTORY AND PROCEDURAL BACKGROUND

This case concerns the interpretation of the injunctive relief provisions of the Satellite Home Viewer Act ("SHVA") and Satellite Home Viewer Improvement Act ("SHVIA") (collectively "the Act"). SHVA and SHVIA grant satellite carriers a compulsory license to retransmit certain copyrighted network television programming to households that cannot receive that programming at a particular level of intensity through the use of normal rooftop television antennas. *CBS. v. EchoStar* 450 F.3d at 508. The transmission of these "distant network signals" thus enable viewers (particularly in rural areas) who are unserved by network television stations to watch network television programs. *Id*. at 508 & nn.1-2.

Respondents are television networks ("the Networks") and network affiliate associations ("the Affiliates"). EchoStar is a satellite carrier. Respondents initiated this litigation in 1998. They alleged that EchoStar was exceeding the copyright license granted to it under the Act by retransmitting distant signal network programs to households that are served by the networks and hence are ineligible to receive those programs. *Id.* at 508-09.

Under the injunctive relief provisions of the Act, Respondents sought to enjoin EchoStar from retransmitting network programming to ineligible households. *Id*. at 509. One of those provisions authorizes district courts to enjoin "individual violations," which entail a "willful or repeated secondary transmission

. . . to a subscriber who is not eligible to receive the transmission . . . " 17 U.S.C. § 119(a)(7)(A). A second provision speaks to "patterns of violations." It states that "[i]f a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station . . . to subscribers who are not eligible to receive the transmission . . . on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier for private home viewing [of that programming]." *Id.* § 119(a)(7)(B)(i).

1. District Court Proceedings. On remand from Eleventh Circuit's reversal of its entry of a preliminary injunction,[1] the district court found that EchoStar's procedures for qualifying viewers eligible to receive distant network programming satisfied the Act, and that EchoStar therefore was not currently engaged in a "pattern or practice" of violations. *CBS Broad., Inc. v. EchoStar Comm'ns Corp.*, 276 F. Supp. 2d 1237, 1254 (S.D. Fla. 2003). In light of that finding, the district court declined to enter a nationwide injunction under Section 119(a)(7)(B)(i) precluding EchoStar from transmitting any distant network programming pursuant to the statutory copyright license. *Id*. at 1254. Concluding that "such an extreme

[1] *CBS Broad, Inc. v. EchoStar Commun's Corp.*, 265 F.3d 1193 (11th Cir. 2001). Ruling in EchoStar's favor, the Eleventh Circuit held that the pre-trial evidence did not support the entry of a preliminary injunction. *Id*. at 1208. In the same opinion, the Eleventh Circuit rejected EchoStar's First Amendment challenge to SHVA. *Id*. at 1211. EchoStar filed a petition for certiorari on the First Amendment question. 2002 WL 32135979. The petition was denied. 535 U.S. 1079 (2002).

sanction" was unwarranted on the evidence before it, the district court exercised its equitable discretion to fashion appropriate relief under Section 119(a)(7)(A). *Id.* The district court thus entered a more modest, but still rigorous injunction, commensurate with the facts that it found.[2]

2. Eleventh Circuit Proceedings**.** On August 13, 2003, the Eleventh Circuit stayed the District Court's injunction pending appeals on both sides. In a decision issued on May 23, 2006, the Eleventh Circuit vacated the district court's injunction. While it did not override the district court's finding that EchoStar was not currently engaged in a pattern or practice of statutory violations, the Eleventh Circuit "read the statute as imposing liability '[i]f a satellite carrier [*ever*] engages in a willful or repeated pattern or practice' of statutory violations." 450 F.3d at 524 (alteration in court of appeals' opinion) (emphasis added). Applying that interpretation, the Eleventh Circuit held that, on the facts found by the district court, EchoStar previously had engaged in a "pattern or practice" of violations of the Act. *Id*. at 525. Most importantly for purposes of this Application, the Eleventh Circuit held that because of that past pattern and practice of violations, the district court had no choice under the Act but to enter a permanent nationwide

[2] The injunction entered by the district court required EchoStar to requalify its distant network subscribers and to disconnect distant network programming to those subscribers who were not eligible to receive it. 276 F. Supp. 2d at 1256. The injunction also ordered EchoStar to disconnect such programming to subscribers even if they were "grandfathered" under the Act. *Id*. at 1257.

injunction barring EchoStar from offering any distant network programming. In reaching that conclusion, the Eleventh Circuit interpreted the phrase "shall order a permanent injunction" in Section 119(a)(7)(B)(i) as eliminating altogether a district court's traditional power to exercise discretion in crafting equitable relief. *Id*. at 526-27.

Petitioners filed a timely petition for rehearing *en banc* in the Eleventh Circuit on June 13, 2006. On July 19, 2006, the Eleventh Circuit denied that petition. A copy of that order is attached. *See* Tab 3, *infra*. On July 25, 2006, Petitioners filed a motion to stay the issuance of the Eleventh Circuit's mandate pending certiorari proceedings. On August 7, 2006, the Eleventh Circuit denied Petitioners' motion to stay the mandate. A copy of that order is attached. *See* Tab 4, *infra*. The parties moved jointly in the district court for a stay of the implementation of the mandate until September 11, 2006 in order to pursue settlement discussions. But on August 17, 2006, the district court denied that request. *See* Tab 5, *infra*. The present due date for EchoStar's petition for writ of certiorari is October 17, 2006 – 90 days from the denial of rehearing by the Eleventh Circuit (July 19, 2006).

STANDARDS FOR GRANTING A STAY OF A LOWER COURT MANDATE

Under Supreme Court Rule 23, "[a] stay may be granted by a Justice as permitted by law." The authority of a Justice to grant an application to stay a lower court mandate is found in 28 U.S.C. § 2101(f), which states:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

28 U.S.C. 2101(f). In exercising that statutory authority, Justices of this Court apply four factors to determine whether to grant an application to stay a lower court mandate: (a) a "reasonable probability" that four Justices of this Court will consider the question presented in the applicant's petition for certiorari sufficiently meritorious to grant the petition; (b) a "fair prospect" that a majority of the Court will reverse the lower court decision; (c) whether the applicant will suffer "irreparable harm" in the absence of a stay; and (d) whether the balance of the equities, including a comparison of the relative harms to the parties and consideration of the public interest, supports the issuance of a stay. *Rostker* v. *Goldberg*, 448 U.S. 1306, 1208 (1980) (Brennan, J., in chambers); *see also Baltimore City Dept. of Social Services v. Bouknight*, 488 U.S. 1301, 1303-04 (1988) (Rehnquist, C.J., in chambers). Application of these factors supports the grant of a stay here.

A. There Is A Reasonable Probability That The EchoStar's Petition For A Writ Of Certiorari Will Be Granted Because The Petition Will Raise A Substantial Question Of National Importance That Is Of Ongoing Concern To This Court.

SHVA and SHVIA authorize satellite carriers to retransmit copyrighted network television programming to households that otherwise would not be able receive that programming. The Act states that upon a finding of a "pattern or practice" of violations by a satellite carrier of the Act's grant of a compulsory license to retransmit copyrighted network programming to unserved households, a district court "shall order a permanent injunction" proscribing the transmission of all such programming to those households. 17 U.S.C. § 119(a)(7)(B)(i). The question presented in the petition for certiorari will be whether that injunctive relief provision strips district courts of their traditional discretion to fashion equitable relief tailored to the particular circumstances of a case. That question is substantial in several respects.

First, the sheer importance of the Act and the profound national impact of the Eleventh Circuit's construction of it in this case are a substantial ground for the exercise of this Court's certiorari jurisdiction. *See United States* v. *Donovan*, 429 U.S. 413, 422 (1977) ("We granted certiorari to resolve these issues, which concern the construction of a major federal statute . . . ."); Robert L. Stern, Eugene Gressman, et al., *Supreme Court Practice* 247 (8th ed. 2002) ("Many of the cases

coming to the Supreme Court on certiorari involve the construction and application of acts of Congress . . . . In some of them it can be shown that there is a conflict of decisions among lower courts or that there is a probable conflict with applicable decisions of the Supreme Court. In others, however, *the importance of the issue is the major basis for securing review*.") (emphasis added). The Act lies at the intersection of two crucial bodies of federal law: copyright and telecommunications. In SHVA, Congress sought to balance copyright protection, on the one hand, with the free flow of information through telecommunications service, on the other. In striking that balance, SHVA embodies the "Congressional preference that all Americans have access to network programming, wherever they live." *CBS* v. *EchoStar*, 265 F.3d at 1210; see also *CBS Inc.* v. *PrimeTime 24*, 245 F.3d 1217, 1229 (11th Cir. 2001) ("[P]rotecting rural consumers who invested in outmoded equipment" is one of the objectives that has support in the Act's legislative history); *id.* at 1231 (Oakes, J., concurring) (Congress' purpose in enacting SHVA was to provide consumers, who "typically resided in rural areas of the country . . . with access to broadcast programming"). Thus, in SHVA, Congress granted satellite carriers a compulsory license to retransmit copyrighted network programming to consumers who otherwise would not receive that programming. SHVIA has the same consumer-oriented bent. It was passed, in part, to address "administrative difficulties in deciding which households were

genuinely unserved" under SHVA, which "led to increasingly bitter disputes between satellite carriers and broadcasters, leaving bewildered, angry consumers stuck in the middle." *Satellite Broad.& Comm'ns Ass'n v. FCC*, 275 F.3d 337, 348 (4th Cir. 2001). All told, the interpretation of SHVA and SHVIA is of great importance to millions of households across the country that rely on satellite communications to receive copyrighted network television programs.[3]

The probability that the petition for certiorari will be granted is significantly enhanced by the fact that the petition is likely to present this Court with its only possible opportunity to decide the statutory construction issue presented. Indeed, this case presents the classic circumstance in which this Court should intervene to decide an issue of national importance, despite the absence of a circuit conflict. No such conflict is likely ever to arise with respect to the question presented because EchoStar is the only satellite carrier affected by judicial construction of the Act at this time,[4] and because EchoStar will be precluded from relitigating in any

[3] The other primary purpose of the Act -- to spur competition between cable and satellite companies in an effort to reduce prices for subscription television services -- also manifests a consumer focus. *See Satellite Broad. v. FCC*, 275 F.3d at 343.

[4] There are only two satellite carriers that presently transmit distant network programming, EchoStar and DirecTV. In 1999, DirecTV reached a settlement with Respondent National Association of Broadcasting with respect to the transmission of distant network programming. *See DirecTV, NAB Beaming Over Deal on Local Feeds*, Hollywood Reporter, July 2, 1999, at 1; *DirecTV, Networks Reach Settlement*, Chi. Trib., Mar 13., 1999, at 2. In litigation involving a former satellite carrier, the Fourth Circuit reached the same conclusion as the Eleventh Circuit with

other circuit in a subsequent case the statutory construction issue decided by this Court in this case. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 331 (1979).

Second, this Court has expressed a recurring interest in the general subject matter of this case – namely the interpretation of acts of Congress that are purported to eliminate the traditional discretion of district courts to fashion appropriate injunctive relief tailored to the particular circumstances of a given case. See, *e.g.*, *Miller v. French*, 530 U.S. 327, 340-41 (2000); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 694 (1979); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Hecht Co. v. Bowles*, 321 U.S. 321, 327-28 (1944). This Court addressed the subject again just last term in *eBay Inc.* v. *MercExchange, LLC.*, 126 S. Ct. 1837 (2006). The exercise of certiorari jurisdiction in *eBay* highlights this Court's continuing interest in guarding the equitable discretion of district courts to craft injunctions even in the face of statutory language that litigants contend removes that discretion.

Third, and as discussed more fully in the next Section, the Eleventh Circuit's ruling that Section 119(a)(7)(B)(i) eliminates the traditional equitable discretion of

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respect to the question to be presented in EchoStar's petition for certiorari. *See ABC, Inc. v. PrimeTime 24*, 184 F.3d 348, 354 (4th Cir. 1999).

district courts to craft injunctions conflicts with this Court's precedent.[5] Time and again, this Court has stressed that federal statutes should not be loosely construed so as to sap entirely that discretion.[6] The Court echoed that theme earlier this year in *eBay*, which (like this case) involved an intellectual property dispute. There, the Court bluntly stated that it "has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed." 126 S. Ct. at 1840.

This Court has indicated that the policies underlying a statute must inform the interpretation of the breadth of the statute's injunctive relief provisions. *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 544-45 (1987), is illustrative. In that case, this Court held that the Ninth Circuit erred in directing the entry of an injunction pursuant to the Alaska National Interest Lands Conservation Act (ANILCA). *Id.* at 545-46. Concluding that ANILCA did not deprive district courts of their traditional equitable discretion in shaping injunctive relief, the Court

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[5] Tension with precedents of this Court furnishes grounds for the exercise of certiorari jurisdiction. Sup. Ct. R. 10(c) (that "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court" is a consideration in granting a petition for a writ of certiorari).

[6] In passing a statute, legislatures are presumed to act with knowledge of legal principles in court decisions. The statute will not alter those principles, unless the legislature expresses a contrary intent. *United States v. Texas*, 507 U.S. 529, 534 (1993). Thus, in SHVA, Congress is presumed to have acted with knowledge of the principle, spelled out in a long line of judicial precedent, that district courts have inherent discretion in crafting injunctions.

rebuked the Ninth Circuit for "erroneously focus[ing] on the statutory procedure rather than on the *underlying substantive policy* the process was designed to effect." *Id.* at 544 (emphasis added). Like the Ninth Circuit in *Gambell*, which disregarded the purposes of the ANILCA, the Eleventh Circuit in this case gave insufficient attention to the purposes of SHVA and SHVIA. The permanent nationwide injunction ordered by the Eleventh Circuit would hinder, rather than promote, the Act's goal of making network television programming available to "all Americans." By contrast, the more modest, but still rigorous injunction, entered by the district court in the exercise of its discretion, *see supra* note 2, will frustrate less the objectives of the Act.

Finally, a threshold misstep by the Eleventh Circuit in determining that Section 119(a)(7)(B)(i) even applied in this case enhances the prospect that EchoStar's petition for certiorari will be granted. By its terms, Section 119(a)(7)(B)(i) is triggered only when a satellite carrier "*engages* in a willful or repeated pattern or practice of statutory violations." 17 U.S.C. § 119(a)(7)(B) (emphasis added). The Eleventh Circuit read this provision to extend to cases in which a "satellite carrier *[ever]* engages in a willful or repeated pattern or practice" of statutory violations. 450 F.3d at 524 (alteration in court of appeals' opinion) (emphasis added). In other words, according to the Eleventh Circuit, the present-tense term "engages" is interchangeable with the past-tense term "ever had

engaged." This interpretation is contradicted by the legislative history of SHVA, which states that Congress did not intend "to subject a satellite carrier to 'pattern or practice' liability. . . provided that the carrier is reasonably diligent in avoiding and *correcting* violations through an internal compliance program." H.R. Rep. No. 100-887(I), at 19. The interpretation also conflicts with the venerable principle that Congress' choice of a particular verb tense should be honored in construing statutes. *United States v. Wilson*, 503 U.S. 329, 333 (1992). It was the failure to adhere to that principle in the first place that led the Eleventh Circuit to reach the question whether Section 119(a)(7)(B)(i) eliminates the traditional equitable discretion of district courts – and then to order an injunctive remedy for old violations that the district court found had been largely redressed through EchoStar's revamped qualification procedures. In short, the Eleventh Circuit reached the dubious conclusion that Congress intended to mandate a sweeping nationwide injunction, detrimental to the interests of hundreds of thousands of individuals throughout the country, on the basis of conduct that had ceased. That conclusion is all the more likely to heighten this Court's interest in deciding whether Section 119(a)(7)(B)(i) divests district courts of their traditional equitable discretion to tailor injunctions to the facts of a particular case.

B. There Is A Fair Prospect That This Court Will Reverse The Eleventh Circuit's Decision.

The Eleventh Circuit's decision runs head on into this Court's consistent refrain for decades that a district court's "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398. In light of this steadfast principle, there is fair prospect that a majority of this Court will conclude that the Eleventh Circuit erred in concluding that the Act strips district courts of their traditional authority to mete out appropriately tailored injunctive relief.

The Eleventh Circuit's characterization of Section 119(a)(7)(B)(i) as containing "no ambiguous statutory language," 450 F.3d at 526, is out of sync with this Court's precedents. Section 119(a)(7)(B)(i) provides that district courts "shall order a permanent injunction" upon finding a pattern or practice of violations. 17 U.S.C. § 119(a)(7)(B)(i). Despite the seemingly mandatory nature of similar language in other statutes, however, this Court has held that the use of the word "shall" does not automatically foreclose a court's equitable discretion to impose narrower remedies. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. at 693 n.9 ("[T]he use of the word 'shall', particularly with reference to an equitable decision, does not eliminate all discretion . . . ."); *Hecht Co.* v. *Bowles*, 321 U.S. at 327-28

(holding that "shall be granted" language in a statute is not mandatory and does not eliminate a court's traditional equitable discretion.). Nothing in SHVA or SHVIA nor the legislative history of the statutes compels the conclusion that the use of the word "shall" in Section 119(a)(7)(B)(i) was intended to denude district courts of their traditional equitable discretion to fashion injunctive relief in a given case.

In reaching the opposite conclusion, the Eleventh Circuit found it dispositive that Section 119(a)(7)(B)(i) states that while courts "may order statutory damages" for pattern or practice violations (which the Eleventh Circuit deemed a "discretionary" remedy), it also states that courts "shall order a permanent injunction" for such violations (which the Eleventh Circuit deemed a "mandatory" remedy). 450 F.3d at 527. According to the Eleventh Circuit, Congress' use of "may" and "shall" in the same provision manifests an "unequivocal[] . . . purpose to restrict the courts' traditional equitable authority upon a finding of a pattern or practice.'" *Id*. The Eleventh Circuit was mistaken.

For one, Congress recognized that satellite carriers could make innocent mistakes in signing up subscribers for distant signal programming and that carriers therefore should not be harshly penalized as a result of such errors. H.R. Rep. No. 100-887 (I), at 19. The legislative history of SHVA indicates that, in light of this concern, Congress sought to give satellite carriers a wide degree of latitude before liability would be imposed. In particular, even if as many as 19% of its subscribers

are ineligible to receive distant network signals, a satellite carrier will not be considered in violation of the statute. *Id*. Under the Eleventh Circuit's construction of "shall" in Section 119(a)(7)(B)(i) as eliminating all equitable discretion of district courts, the entry of a mandatory, permanent nationwide injunction could turn on the slightest of numerical discrepancies: a permanent nationwide injunction must be entered upon a finding of a pattern and practice of violations in which 20% of a carrier's subscribers are ineligible, but such an injunction cannot be entered if 19% of a carrier's subscribers are ineligible. There is no clear sign that Congress intended to command district courts to enter a permanent nationwide injunction based on such razor-thin distinctions.

The Eleventh Circuit's interpretation of the phrase "shall order a permanent injunction" as a dictate to district courts to do so could lead to other peculiar results. It would, for example, require the entry of an injunction even if a copyright owner has unclean hands or unduly delayed seeking relief – considerations that courts, in the exercise of their discretion, routinely take into account in tailoring an injunction. *See* 11A Wright, Miller, & Kane, *Federal Practice and Procedure* § 2946, at 108, 116 (2d ed. 1995).

Finally, the Eleventh Circuit's interpretation is mistaken because it upsets the competitive balance between satellite carriers and cable companies that Congress sought to achieve in SHVA. *See supra* note 3. Injunctive remedies for a cable

company's violations of a network's copyrighted programming are discretionary. 17 U.S.C. §§ 111(c)(2), 502. By insisting that injunctive remedies for certain violations by satellite carriers of that same copyrighted programming are mandatory, the Eleventh Circuit gave a leg-up to cable companies. This contravenes SHVA's goal of placing satellite carriers and cable companies on equal footing in the marketplace. Here too, there is no indication that Congress intended the application of Section 119(a)(7)(B)(i) to have that result.

C. Petitioners Will Suffer Irreparable Harm If The Mandate Is Not Stayed.

Petitioners will be irreparably harmed if the mandate is not stayed. To comply with the nationwide permanent injunction that the district court will be required to enter if the Eleventh Circuit's mandate is not stayed, Petitioners will be obligated to terminate distant network programming to massive numbers of its subscribers—and even to subscribers who indisputably are eligible under the Act to receive such programming.[7]

The number of EchoStar subscribers affected by this looming injunction is staggering. It reaches into the hundreds of thousands of individual consumers. *See* Declaration of David Moskowitz (Tab 6, *infra*), ¶ 3. As a practical matter, the

[7] Among the subscribers eligible to receive distant network signal programming are those who are the beneficiaries of settlement agreements that EchoStar has reached with some of the original Plaintiffs in this case. The Eleventh Circuit's order, if not stayed, will have the effect of negating those agreements by enjoining Petitioners' broadcasting.

termination of those subscribers' connections will be time-consuming and costly for Petitioners. *Id*. ¶ 4. And even if this Court ultimately sustains Petitioners' position, the costs to Petitioners of disconnection and reconnection are irretrievable. *Id*. The abrupt termination of hundreds of thousands of subscribers also will result in severe and irreparable damage to Petitioners' business goodwill. *Id*. ¶ 5. For one, Petitioners will have less credibility with existing subscribers. *Id*. Furthermore, large numbers of subscribers who will be deprived of access to network broadcasting programming are likely to cancel their remaining EchoStar satellite services, and are unlikely to resubscribe even in the event the Eleventh Circuit's decision is reversed by the Supreme Court. *Id*. This loss of customer goodwill constitutes an "irreparable" injury because monetary damages for such losses are inherently difficult to compute. *See Ferrero v. Assoc. Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999).

Without a stay, vindication of Petitioners' case before this Court will ring hollow. The complexity of the termination process, the concomitant harm to business goodwill, the burdens of the potential reconnection process, and the prospect of forever losing subscribers who are terminated and never resubscribe, will saddle Petitioners with costs that simply cannot be recovered on appeal. In such circumstances, a stay of the mandate is warranted. See *McDaniel* v. *Sanchez*,

448 U.S. 1318, 1322 (1980) (Powell, J., in chambers) (staying Fifth Circuit's mandate in part because party seeking stay would incur "substantial" and "irretrievable" expenditures if mandate issued).

D. The Balance Of The Equities Favors Staying The Mandate.

The final factor, the balance of the equities, also strongly supports a stay of the mandate. Balancing the equities requires consideration of the "interests of the public at large" as well as those of the private parties involved in the case. *Barnes* v. *E-Systems, Inc.*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers) (internal quotations omitted).

Here, a stay will serve the public interest by promoting the purposes of SHVA and SHVIA. Blunderbuss disconnection of service pursuant to the nationwide permanent injunction ordered by the Eleventh Circuit will undermine Congress' objectives in SHVA and SHVIA by divesting hundreds of thousands of consumers of access to network television programming and adversely impacting competition in the video services market. Such abrupt termination of service and disruption of competitive balance were precisely the outcomes that Congress sought to prevent. See 145 Cong. Rec. S57-02 (daily ed. May 20, 1999) (statement of Sen. Hatch) ("We need to act quickly on this legislation. The Satellite Home Viewer Act sunsets at the end of this year, placing at risk the service of many of the 11 million satellite subscribers nationwide."); *id.* (statement of Sen. Leahy) ("We

have been racing against the clock because court orders have required the cutoffs of distant CBS and Fox television signals to over a million households in the U.S.").[8]

Moreover, unlike portions of the Copyright Act that tightly protect copyright holders' interests, the Act confers on satellite carriers a compulsory license to retransmit copyrighted works. Underlying Congress' grant of that compulsory license was a recognition of consumers' need for, and interest in, access to network television programming. 145 Cong. Rec. S14696-03 (daily ed. Nov. 17, 1999) (statement of Sen. Lott) ("[T]he Conference Committee is aware that in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders . . . ."). In permitting the retransmission of copyright material under the auspices of the Act, Congress thus viewed the public interest from the perspective of consumers, rather than from the perspective of broadcasters and network affiliates.

In contrast to the harm to the public interest that will arise if the Eleventh Circuit's mandate is not stayed, Respondents will not suffer unduly from a stay of

[8] SHVIA was enacted 1999 in response to the public outcry spawned by broad injunctions entered in litigation involving another, then-existing satellite provider, PrimeTime24. See H.R. Rep. No. 106-79, 106th Cong., pt. 1, at 14 (1999). ("While the courts' ability and authority to interpret the law is unquestionable, their remedies are sometimes too blunt, particularly in cases, such as this one, where the remedy affects a broad class of consumers who, to the best of their knowledge, violated no Federal law.").

the mandate. This litigation has been going on for eight years now. Given that long history, EchoStar's request for a relatively short stay is modest. EchoStar asks only that issuance of the mandate be deferred briefly to allow the certiorari proceedings to run their defined course. When push comes to shove with respect to the balancing of the equities, Respondents cannot show that they will incur great harm during the limited period a stay is in effect – and certainly nowhere near the harm that EchoStar will incur if the injunction is implemented.

A salient consideration here is that the district court found that Petitioners' existing qualification procedures (with the exception of Petitioners' reliance on two vendors for ILLR analysis, a procedure that Petitioners have voluntarily abandoned) comply with the Act. 276 F. Supp. 2d at 1254 ("The current qualification system employed by EchoStar[] and applied to every potential distant network subscriber is a reasonable system to prevent ineligible households from receiving distant network programming . . ."). [9] The Eleventh Circuit did not disturb that finding on appeal. Thus, if the mandate is stayed, Petitioners' existing qualification system will ensure that, during the pendency of the certiorari proceedings before this Court, Respondents' copyrighted programming will be not retransmitted to new subscribers who are ineligible to receive distant network

[9] Even a representative of Respondent CBS Affiliates Association conceded that EchoStar has made great strides in seeking to qualify subscribers. 276 F. Supp. 2d at 1246, 1257.

signals. Furthermore, while the mandate is stayed, the Networks will reap their share of the periodic royalty payments that Petitioners will make (and have made) related to subscribers who receive distant network programming. 276 F. Supp. 2d at 1254. In sum, the balance of the equities tips squarely in the Petitioners' favor.[10]

[10] The district court found that the Networks had suffered "economic injury" from EchoStar's actions. 276 F. Supp. 2d at 1255. The Respondents did not, however, seek damages, *id.* at 1239, and, in any event, economic losses alone do not rise to the level of irreparable harm for purposes of the equities analysis. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). Affiliates argued that they would incur the loss of advertising revenue. 276 F. Supp. 2d at 1255. For purposes of the equities analysis, however, this type of speculative loss does not constitute irreparable injury. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that an order be entered recalling and staying the Eleventh Circuit's mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 17th day of August, 2006, a copy of the foregoing Application To Stay The Mandate Of The United States Court Of Appeals For The Eleventh Circuit was placed in an envelope for overnight delivery and sent via electronic mail to the following attorneys for Respondents:

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