

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MANHATTAN COMMUNITY ACCESS)
CORPORATION, ET AL.,)
) Petitioners,)
) v.) No. 17-1702
DEEDEE HALLECK, ET AL.,)
) Respondents.)

Pages: 1 through 75
Place: Washington, D.C.
Date: February 25, 2019

HERITAGE REPORTING CORPORATION
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10
11 Washington, D.C.
12 Monday, February 25, 2019

13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:05 a.m.

17
18 APPEARANCES:
19 MICHAEL B. DE LEEUW, ESQ., New York, New York;
20 on behalf of the Petitioners.
21 PAUL W. HUGHES, ESQ., Washington, D.C.;
22 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-1702, the
5 Manhattan Community Access Corporation versus
6 Halleck.

7 Mr. De Leeuw.

8 ORAL ARGUMENT OF MICHAEL B. DE LEEUW
9 ON BEHALF OF THE PETITIONERS

10 MR. DE LEEUW: Mr. Chief Justice, and
11 may it please the Court:

12 Careful adherence to this Court's
13 state action cases is necessary in order to
14 preserve the lines between government action
15 and private conduct.

16 The challenged conduct -- the purpose
17 of the test is to determine whether it is --
18 whether private action falls into the very rare
19 exception of conduct that is fairly
20 attributable to the state. Now MNN is not a
21 state actor under any of this Court's state
22 action tests, and its conduct is therefore not
23 fairly attributable to the state.

24 MNN is a private, nonprofit company.
25 Its board is not controlled by the City of New

1 York. The challenged conduct here was not
2 compelled or coerced by the City of New York.
3 There are no allegations that MNN acted jointly
4 with the City of New York with regard to the
5 challenged conduct. And MNN does not perform a
6 function that has traditionally and exclusively
7 been carried out by the City of New York.

8 JUSTICE GINSBURG: But MNN --

9 CHIEF JUSTICE ROBERTS: Well, you
10 say --

11 JUSTICE GINSBURG: -- was engaged by
12 the city to administer a scheme that was
13 determined by state and city law, that is, to
14 afford access on a first-come, first-served
15 basis, giving MNN no independent judgment about
16 what will air or when it will air. So it seems
17 that MNN is an administrator of a city/state
18 policy, this first-come, first-served, and
19 unlike other arrangements, it has no
20 independent decision-making authority.

21 MR. DE LEEUW: Respectfully, Justice
22 Ginsburg, that's not quite correct. The grant
23 agreement under which MNN operates, it's a
24 grant agreement between the cable operator,
25 which was originally Time Warner and is now

1 Charter. That agreement actually does grant us
2 the ability to curate content. It also grants
3 us the ability to create our own content.

4 So the distinction that my friend has
5 made about -- about putting MNN on one side of
6 the spectrum as a party that has no discretion
7 and other community access organizations on the
8 other hand that do exercise discretion is -- is
9 not correct.

10 JUSTICE SOTOMAYOR: I'm sorry. It
11 just means it's a mixed actor, meaning you can
12 -- it has its own speech. Government often has
13 its own speech. So that it can create speech,
14 I don't think, means anything.

15 Similarly, time, place regulations,
16 that anybody can do that or -- or whether it's
17 the government or a private actor with respect
18 to property. So the question, I think, is,
19 does it have discretion with respect to the
20 content and its viewpoint neutrality on what
21 the state is controlling, which is the
22 placement rights on these cable lines?

23 MR. DE LEEUW: So the -- the -- the
24 answer to that is that MNN does have discretion
25 on the placement rights on -- which are not

1 placement rights that the city has but
2 placement rights that, through the grant
3 agreement, are directly to MNN.

4 And MNN does have the power to --

5 JUSTICE SOTOMAYOR: Only because it's
6 the agent directly of the state. The state has
7 the relationship with Time Warner and tells
8 them that Time Warner must deal with MNN.

9 MR. DE LEEUW: Well, that's not quite
10 true, Justice Sotomayor. The -- the agreement
11 between Time Warner, the -- the cable operator,
12 and MNN is an independent agreement that is
13 negotiated between those two parties. The city
14 is not a party to that grant agreement. That
15 grant agreement, in turn, gets approved by the
16 -- the Public Service Commission in New York.

17 So the grant agreement gives us much
18 broader rights to curate content, to decide to
19 put shows together on one of our channels or a
20 different channel. So the scheduling is not
21 purely mechanical. It's not as if we take one
22 videotape or CD from the street and put it in
23 the machine and -- and then put the next one
24 in.

25 JUSTICE KAGAN: Mr. De Leeuw --

1 CHIEF JUSTICE ROBERTS: Are these --
2 the facts that you've been talking about in
3 terms of your cure -- that you curate the
4 content, are they disputed in the case?

5 MR. DE LEEUW: Yes.

6 CHIEF JUSTICE ROBERTS: In the case
7 that you point out comes before us on the
8 pleadings.

9 MR. DE LEEUW: Well, again, these
10 issues were not on the pleadings. These issues
11 were not raised on the pleadings. The -- the
12 grant agreement, which was introduced by -- by
13 Respondents, makes clear that we have that
14 right to curate.

15 In their -- in Respondents' brief to
16 the Court, they said that we did not have that
17 right, that we were bound solely by the
18 first-come, first-served, and they made that
19 sound as if it's a purely mechanical -- that --
20 that strips us of any discretion whatsoever.

21 That -- that's -- that's so -- it is
22 -- it is in dispute. Pardon me?

23 JUSTICE BREYER: Sorry, were you
24 finished?

25 CHIEF JUSTICE ROBERTS: Yeah.

1 JUSTICE BREYER: Look, your brief, the
2 PSC regulations require that content on public
3 access channels be "non-commercial" and that
4 access must be "on a first-come, first-served
5 non-discriminatory basis."

6 So what is your discretion?

7 MR. DE LEEUW: So our discretion is
8 based on -- that -- that is what the regulation
9 says.

10 JUSTICE BREYER: And that's what you
11 say. So --

12 MR. DE LEEUW: Well, that's what we
13 say and --

14 JUSTICE BREYER: -- so what is your
15 discretion?

16 MR. DE LEEUW: And what the regulation
17 says. In the grant agreement itself, the grant
18 agreement gives us broader discretion than
19 that. The grant agreement, which is between
20 the cable operator and MNN, gives us the
21 discretion to group channels -- group shows
22 together, put them on one particular channel,
23 and that's, again, approved by the -- by the
24 PSC.

25 JUSTICE BREYER: Well, put -- putting

1 shows on Channel 14 rather than Channel 16
2 wouldn't seem like relevant discretion, would
3 it? I mean, what's broadcast out, whether it's
4 14 or 16, is absolutely determined by this
5 rule. At least that's how I read your brief to
6 say it.

7 MR. DE LEEUW: That -- that's true.
8 We do not prescreen videos. We -- they come
9 into the door. We put them on the air. So we
10 do that.

11 JUSTICE BREYER: All right. There's
12 another question then that I have --

13 MR. DE LEEUW: Okay.

14 JUSTICE BREYER: -- which I can't get
15 out of the brief. There are 13 directors,
16 right?

17 MR. DE LEEUW: Correct.

18 JUSTICE BREYER: And two of them are
19 chosen by the government?

20 MR. DE LEEUW: Correct.

21 JUSTICE BREYER: How are the other 13
22 chosen?

23 MR. DE LEEUW: The other -- the other
24 11 are chosen through a --

25 JUSTICE BREYER: Eleven, yeah.

1 MR. DE LEEUW: -- I believe there's a
2 nominating committee on the Board that
3 nominates people from media, from
4 entertainment, from --

5 JUSTICE BREYER: And who creates the
6 nominating committee?

7 MR. DE LEEUW: The -- the Board. It's
8 a subcommittee of the Board.

9 JUSTICE BREYER: So -- but why -- then
10 that's your -- the -- the -- it's a
11 self-perpetuating board? The other members are
12 chosen by a nominating committee. The
13 nominating committee is selected by the Board.
14 I think this would help you. And only two of
15 the members are actually chosen by the
16 government.

17 MR. DE LEEUW: That's -- they're not
18 even chosen by the government. They're
19 nominated.

20 JUSTICE BREYER: Are the other 11
21 members governmental people or have no
22 governmental connection?

23 MR. DE LEEUW: They have no
24 governmental connection. And even the two that
25 are nominated by the Board are not necessarily

1 government-related --

2 JUSTICE BREYER: Well, why didn't you
3 put that in the brief?

4 MR. DE LEEUW: Nominated. Pardon me?

5 JUSTICE BREYER: Did you put that in
6 your brief?

7 MR. DE LEEUW: I believe it's in -- I
8 believe it's in there somewhere, but the -- the
9 -- the -- the dispositive issue was that the --
10 that the city of -- the borough president only
11 has the ability to nominate two out of the 13.

12 JUSTICE ALITO: Suppose that --

13 JUSTICE KAGAN: Mr. De Leeuw, what
14 would you think is the right result if you had
15 the obligation that you think you don't have?
16 In other words, just assume for the moment that
17 you did have to follow a first-come,
18 first-served rule and that you didn't have the
19 discretion that you think you have over
20 programming.

21 What would then the right answer be?

22 MR. DE LEEUW: The right -- the right
23 answer, Justice Kagan, would be that the
24 Respondents or -- or any other producers that
25 have a complaint with us go to the Public

1 Service Commission, which has a specific cause
2 of action that one can bring if you go --

3 JUSTICE KAGAN: Well, I guess I'm
4 going back to Justice Ginsburg's question. On
5 the assumption that you don't have discretion,
6 that you have to follow a first-come,
7 first-served rule, I think that Justice
8 Ginsburg asked why doesn't that essentially
9 make you -- you -- you've been designated by
10 the city to administer a public forum.

11 MR. DE LEEUW: Well, I think that -- I
12 think that it just -- it doesn't do that
13 because there's a long line of cases from this
14 Court that said that regulation of a private
15 entity is not enough to bring it within the
16 ambit of a state action. So with regard --

17 JUSTICE KAGAN: So you would say it's
18 because you're private?

19 MR. DE LEEUW: We are private.

20 JUSTICE KAGAN: Yeah. So -- but --
21 but I think the city thinks that it has a
22 property right here. It has -- you know, it's
23 a property right that comes from a contract
24 where the city has reserved for itself the
25 ability to decide what programming should be.

1 MR. DE LEEUW: So the issue of whether
2 there is a property right is certainly
3 something that was not addressed below. It
4 would certainly -- it would be a different type
5 of property right than any one that I've seen.

6 There's the -- there was a discussion
7 in this Court's Denver Area case about whether
8 or not there was some kind of easement created
9 in these public -- in the public -- in the
10 cable system. And, you know, Justice Thomas,
11 in his -- in his partial concurrence, argued
12 that there was no easement available for
13 something like this. Easement is a concept
14 that's known in real property.

15 JUSTICE KAGAN: Well, you can talk
16 about it as an easement or you can just talk
17 about it as a contract right, but -- but these
18 cable operators would not be able to function
19 unless the government had given them these
20 public rights-of-way.

21 And in exchange for giving them these
22 public rights-of-way, the government says:
23 Well, we're going to take certain stations and
24 we're going to decide what the programming for
25 those stations will be.

1 And, you know, given that the whole
2 thing doesn't get off the ground unless the
3 government gives the cable operators the
4 rights-of-way and that it -- it exacts a quid
5 pro quo for that, why isn't there, call it what
6 you want, a property right coming from a
7 contract or an easement or whatever?

8 MR. DE LEEUW: Well, specifically, the
9 -- the -- Justice Kagan, what the contracts
10 don't do is that they don't give the city the
11 right to choose what content is going to be on
12 the public access channels.

13 The -- the -- the city -- the --
14 pardon me, the franchise agreement specifically
15 gives the government the right to decide what's
16 going to be on the government and education
17 channels, which are -- are -- are different.
18 And it says that those actually have to be
19 overseen by a committee of the -- appointed by
20 the city.

21 The -- the other side of that is the
22 public access, which is a different concept.
23 Public access, there is no requirement that the
24 government operate it. In fact, the -- the
25 default under the -- under the state regulation

1 is that the independent cable operator is going
2 to be the party that operates the -- the public
3 access channel unless and until the
4 municipality, in this case the City of New
5 York, appoints a third-party to do it.

6 The -- the other -- the franchise
7 specifically says that the public access
8 channels will be under the jurisdiction of the
9 community access organization, MNN. So we have
10 jurisdiction over those channels for purposes
11 consistent with law and for other things that
12 our Board deems to be appropriate.

13 Now that is in contrast with the --
14 the government and education channels, which
15 are explicitly put under the jurisdiction of
16 the Mayor of the City of New York.

17 CHIEF JUSTICE ROBERTS: The city can
18 kick you out at any time, right?

19 MR. DE LEEUW: I don't know that
20 that's true. There's no right in the franchise
21 agreement that gives that -- that -- that gives
22 the city that right. There's nothing in the
23 regulations that says the -- the city can go --

24 CHIEF JUSTICE ROBERTS: Well, I don't
25 know that it's the same principle in this

1 context, but at -- at least with respect to
2 federal appointees, usually the power to
3 appoint carries with it the power to -- to
4 fire.

5 MR. DE LEEUW: And, again, I -- we
6 don't know the answer to that. There is no --
7 there is no express provision. My friend says
8 there is express provision. I don't think that
9 there is. Maybe there is an implied one.

10 We've never had an issue where the
11 city threatened to fire us or had any issue
12 with us about -- about the way that we
13 administered the channels, so it hasn't come
14 up.

15 It's a -- you know, it's a latent,
16 unexercised right. In our reply brief, we
17 noted it would be like saying that a private
18 road or a private drive was a public forum just
19 because the government could take it by eminent
20 domain.

21 JUSTICE ALITO: Well, maybe all this
22 depends on whether there's some sort of
23 recognized property interest involved, but
24 maybe it doesn't.

25 And if we step back and ask who owns,

1 in the colloquial sense at least of the word,
2 these channels, is it the cable company or is
3 it the government, what would your answer be?

4 MR. DE LEEUW: My answer would
5 definitely be the cable company.

6 JUSTICE ALITO: How can that be? The
7 -- I mean, the cable company didn't decide that
8 it wanted to dedicate these channels to this
9 purpose, and it doesn't control what's on these
10 channels. It's the government that said you
11 have to provide these channels and make them
12 available on certain grounds.

13 MR. DE LEEUW: But the ownership right
14 of the entire cable system -- and I don't think
15 this has been disputed -- is the cable -- is
16 the cable operator, so in this case Charter.

17 Now -- what's that? Pardon me?

18 JUSTICE SOTOMAYOR: Physical goods,
19 that's like the railroads owning the railroad
20 track.

21 MR. DE LEEUW: Correct.

22 JUSTICE SOTOMAYOR: But for decades
23 now -- not for decades -- for centuries, our
24 cases have recognized that the railroad can own
25 -- can own the tracks, it can own the switches,

1 it can own the depots, but there's still a
2 government access right to the use of the rail
3 -- of the -- of the tracks.

4 MR. DE LEEUW: Right. And --

5 JUSTICE SOTOMAYOR: So, here, the
6 government controls the content of what's on
7 those cables.

8 MR. DE LEEUW: No. Respectfully, I
9 disagree with that. The -- the issue of
10 control is a whole separate issue of the one of
11 property that -- that Justice Alito raised.

12 JUSTICE SOTOMAYOR: That's never --
13 that's always the case with property.

14 MR. DE LEEUW: Sure. The --

15 JUSTICE SOTOMAYOR: Property is a
16 right -- a prop -- a property right is a right
17 or privilege to use something to the exclusion
18 of others or to the exclusion of the other
19 owners. So, I mean, it's a simple definition
20 of what a property right is.

21 MR. DE LEEUW: Right. But this is a
22 -- this is a situation where a private entity
23 is controlling the channels.

24 CHIEF JUSTICE ROBERTS: Did you want
25 to -- did you want to complete your answer to

1 Justice Alito?

2 MR. DE LEEUW: So -- yes, I'm sorry.
3 Justice Alito, the -- the -- to us, the issue
4 is about control and who is controlling the
5 public access channels. And in this case, it's
6 clearly MNN is controlling. It's under its
7 jurisdiction according to the grant agreement.
8 The city designated us to operate them 28 years
9 ago and then hasn't said a word to us about
10 that.

11 JUSTICE ALITO: Well, suppose the city
12 appointed MNN to decide who would have access
13 to a facility in Central Park.

14 MR. DE LEEUW: Okay.

15 JUSTICE ALITO: Would you say MNN is
16 not -- MNN is not then a state actor in
17 exercising that authority?

18 MR. DE LEEUW: So, if I understand the
19 hypothetical, so the idea is that MNN is taking
20 on a role of managing parades or something in
21 Central Park?

22 JUSTICE ALITO: Well, let's say
23 there's a place where people can go and speak
24 in Central Park or there is a -- a facility
25 where concerts are put on.

1 MR. DE LEEUW: Right.

2 JUSTICE ALITO: And -- and the city
3 enters into exactly the kind of agreement it
4 has with MNN, MNN, and says you -- you --
5 you're in charge of this.

6 MR. DE LEEUW: Right. So --

7 JUSTICE ALITO: Are you then a state
8 actor?

9 MR. DE LEEUW: I think it's a much
10 closer call because of the public function
11 test. If -- if MNN was doing something that
12 the city has traditionally and exclusively
13 done, which is operate this speaking corner of
14 the park, then I would think that that would be
15 a much closer case and -- and might well have
16 the private operator as a state actor under the
17 public function test.

18 JUSTICE BREYER: What is the -- the --
19 the --

20 JUSTICE KAGAN: What is the difference
21 between Justice Alito's hypothetical?

22 MR. DE LEEUW: Well, so the main
23 difference is that the public function test has
24 never been read broadly. It's always looked at
25 the specific activity that the -- that the

1 entity is -- is involved in.

2 JUSTICE KAGAN: Well, let's say that
3 the city has decided we want a public theater.
4 And so it creates a public theater. It decides
5 it wants to use a first-come, first-served
6 system. It decides it doesn't want to do the
7 scheduling itself, so it hires somebody to
8 administer the public theater under the rules
9 that it should all be first-come, first-served.

10 Would -- would that administrator be a --
11 a state actor?

12 MR. DE LEEUW: So I guess the other --
13 the -- the one additional fact I'd want to know
14 in the hypothetical is, is it -- is it city
15 property? Is it a theater that is owned by the
16 city?

17 JUSTICE KAGAN: Right. So that could
18 be one point of distinction --

19 MR. DE LEEUW: Okay.

20 JUSTICE KAGAN: -- is, is it property,
21 and then we're back to the question that we
22 started with.

23 MR. DE LEEUW: Right. But -- but I
24 think the --

25 JUSTICE KAGAN: But put that aside for

1 a moment.

2 MR. DE LEEUW: Putting that aside --
3 putting that aside, I would say that the answer
4 is no. The key to look at when you're looking
5 at a forum that is not one of the traditional,
6 the street, sidewalk, or park, is to look at it
7 and say: Is this forum being operated by the
8 government?

9 And when you look at it and you say
10 the -- the -- the private entity is there
11 operating this -- this forum, it's not the
12 government --

13 JUSTICE KAGAN: Well, the government
14 says we set the rules about how this is going
15 to operate. We decided we wanted a theater.
16 We decided we wanted first-come, first-served.
17 All we're asking you to do is, you know, we
18 don't have an extra employee to administer this
19 program, so we're contracting that function
20 out.

21 But what makes that person then the
22 independent actor as opposed to the person
23 who's essentially doing everything that the
24 government would do, except that the government
25 thinks it's more efficient to hire somebody

1 else?

2 MR. DE LEEUW: Well, again, in -- in
3 this Court's decision in Jackson versus
4 Metropolitan Edison, a regulation like that,
5 even -- even pervasive regulation of a private
6 entity, does not convert that private --

7 JUSTICE BREYER: All right. But --
8 but assume I -- I can read the cases. What I
9 can't do is figure out what the facts are. And
10 so that's what I'm focusing on.

11 It's now -- do you have this power:
12 At 5 p.m., something will be broadcast over
13 your channel. Okay?

14 MR. DE LEEUW: Yes.

15 JUSTICE BREYER: Do you have the power
16 to say this evening we wish to discuss subways;
17 tomorrow at 4:00, we will discuss the public
18 schools? All right. Do you have that power?
19 Or, if we have one speaker who wants to talk
20 about public schools and another one who wants
21 to talk about subways, they have to go in
22 whatever jumble they want, so people can't
23 figure out the issues because there are 40,000
24 issues in New York, and do we have a general
25 conversation about all of them at once, or do

1 you have the power to order that?

2 MR. DE LEEUW: So we have the power to
3 -- to put on shows at specific times. I -- I'm
4 sorry.

5 JUSTICE BREYER: Shows. Look,
6 first-come, first-served, tell me if I'm wrong,
7 in my mind, is there 40,000 issues, people can
8 discuss them in any order, and anyone who wants
9 to come up and broadcast can discuss any issue,
10 and you have no power to change that, or you do
11 have the power to organize it and have first a
12 subway discussion, then another discussion.
13 Which is it?

14 MR. DE LEEUW: We have the -- we have
15 the power to organize it to some degree.

16 JUSTICE BREYER: What -- to what
17 degree?

18 (Laughter.)

19 MR. DE LEEUW: Well, so to the degree
20 related to the -- to -- to the grant in the
21 grant agreement, which allows --

22 JUSTICE BREYER: That doesn't help me.

23 MR. DE LEEUW: Okay.

24 JUSTICE BREYER: You see, I have a
25 simple factual question. Tomorrow I want to go

1 and interrupt somebody who's in the subway
2 discussion. As soon as he's finished, I want
3 to discuss New York and hot dogs, okay?

4 MR. DE LEEUW: Okay.

5 JUSTICE BREYER: Now do you have to
6 let me, yes or no?

7 MR. DE LEEUW: Well, it would depend
8 on who else has submitted tapes and whether or
9 not --

10 JUSTICE BREYER: Well, somebody else
11 has submitted a tape that they'd like to
12 discuss schools. So I am third. That --
13 that's a factual question.

14 MR. DE LEEUW: Right.

15 JUSTICE BREYER: What is it?

16 MR. DE LEEUW: Well, your -- I mean, I
17 think the -- the answer is that your show will
18 -- will get on. Will it get on at exactly the
19 time --

20 JUSTICE BREYER: All right.

21 MR. DE LEEUW: -- you want it to? No.

22 JUSTICE BREYER: But I -- I will come
23 third.

24 MR. DE LEEUW: Okay.

25 JUSTICE BREYER: First-come,

1 first-served, is that right?

2 MR. DE LEEUW: Correct.

3 JUSTICE BREYER: So it has to be a
4 jumble?

5 MR. DE LEEUW: Well, it doesn't have
6 to be a jumble. There are -- some of our --

7 JUSTICE BREYER: Of course -- of
8 course, it might be coincidence that it isn't
9 --

10 MR. DE LEEUW: No. No, no.

11 JUSTICE BREYER: -- but you have no
12 power not to make it a jumble?

13 MR. DE LEEUW: No, that's not true.
14 We do have power to have some -- some ability
15 to organize our channels.

16 JUSTICE BREYER: What?

17 MR. DE LEEUW: The -- we can decide
18 that shows that are appropriate for children
19 will be shown in the morning and shows that are
20 appropriate for adults will be shown at night.
21 We can decide that we will cluster a series of
22 shows about New York hot dogs. There happen to
23 be five of them with different opinions. We'll
24 put them on at the same -- in a -- in a row so
25 that people can have a broad view of the merits

1 of those.

2 JUSTICE KAVANAUGH: Does your -- does
3 your argument depend on having editorial
4 discretion? In other words, if you have no
5 editorial discretion at all, do you still win
6 under Jackson? Is that your theory?

7 MR. DE LEEUW: We -- we still win
8 under Jackson. We think that the -- that the
9 lack of discretion does not convert us into a
10 state actor.

11 Under Jackson, under Sullivan, under
12 all the cases that have looked at pervasive
13 regulation, that has never been held to be
14 enough to convert a private party's action into
15 that of the state. In Rendell-Baker, Blum, the
16 entire series of cases that have looked at that
17 issue, they've all held that regulation, even
18 pervasive regulation, is not sufficient.

19 JUSTICE SOTOMAYOR: But none of those
20 cases involved the state or the government
21 designating something a public forum. They've
22 involved traditional public forums. That's a
23 different issue.

24 But we have three categories:
25 traditional, designated, and private. And this

1 is very different because this is the
2 government designating this a public forum.

3 MR. DE LEEUW: Well, so the government
4 makes a lot of decisions. The -- the
5 government, by act of Congress, created the
6 U.S. Olympic Committee. The government -- the
7 government creates a lot of entities.

8 JUSTICE SOTOMAYOR: But not all of
9 them are designated public forums.

10 MR. DE LEEUW: No, that's --

11 JUSTICE SOTOMAYOR: Many of them are
12 limited.

13 MR. DE LEEUW: That's true, but to --
14 but to create --

15 JUSTICE SOTOMAYOR: But this one is
16 very different. This one says first-come,
17 first-served, and your only discretion is
18 against things that are not speech, obscenity,
19 et cetera.

20 MR. DE LEEUW: Right. Well -- well, I
21 would push back on your assumption. By saying
22 that the government has -- has created a
23 designated public forum, that's already
24 answering the question about state action.

25 If the government is creating a forum

1 and does not retain control over it, then it is
2 not going to be a designated public forum of
3 constitutional dimension.

4 And we've tried to make that
5 distinction in our briefs because something can
6 be called a public forum and they're all over
7 the place. The -- the -- but that does not
8 convert it to being a public forum of
9 constitutional dimension.

10 So, in your example, if the city
11 creates a designated public forum, in order to
12 get there, you have to have already determined
13 that it is a designated public forum of
14 constitutional dimension.

15 JUSTICE SOTOMAYOR: So --

16 MR. DE LEEUW: And to have that, you
17 need state actors.

18 JUSTICE SOTOMAYOR: -- what's the
19 difference -- if we go back to the questions my
20 colleagues asked earlier, the city rents a
21 theater, doesn't own it, but rents it or leases
22 it or somehow takes possession of it through
23 contract. It designates it a public forum,
24 says anyone can use the theater, first-come,
25 first-served, although -- and hires someone to

1 administer that forum. So what's the
2 difference?

3 MR. DE LEEUW: Well, I -- I --

4 JUSTICE SOTOMAYOR: I -- I -- I don't
5 understand. You -- they can -- they have to
6 clean it. They have to --

7 MR. DE LEEUW: Who is "they" have to
8 clean it? The -- the private owner?

9 JUSTICE SOTOMAYOR: The administrator
10 has to get it cleaned, has to provide
11 security --

12 MR. DE LEEUW: Yeah. So --

13 JUSTICE SOTOMAYOR: -- has to sort of
14 organize the -- the hours, et cetera, but,
15 nevertheless, the city says this -- we've -- we
16 rent the property, we have the power to tell
17 you keep it open, keep it free, keep it
18 first-come, first-served; your only ability to
19 restrict is time, place, and/or obscenity and
20 other illegal conduct.

21 MR. DE LEEUW: Well, it sounds like --
22 like that situation would be different than
23 ours because it sounds like it would be closing
24 in on Burton versus Wilmington Parking
25 Authority, where there is a symbiotic or joint

1 connection between what the city is doing and
2 what the private entity is doing.

3 Now there's no allegations with regard
4 to MNN that there's anything like that, no
5 symbiotic relationship, no entwinement with the
6 city at all.

7 JUSTICE SOTOMAYOR: But why do you
8 need that?

9 MR. DE LEEUW: Well, that's --
10 that's --

11 JUSTICE SOTOMAYOR: If the city rents
12 it, says this is how we're going to use it,
13 this is the way it's going to be used, why do
14 you need anything more? What greater control
15 do you need?

16 MR. DE LEEUW: The greater control you
17 need is you need the -- the -- the forum to be
18 operated by a state actor, by someone that can
19 be --

20 JUSTICE SOTOMAYOR: So now --

21 MR. DE LEEUW: -- fairly said to be so
22 called --

23 JUSTICE SOTOMAYOR: -- now we have the
24 state eluding responsibility by simply figuring
25 out how to have adequate independence.

1 MR. DE LEEUW: Well, I don't think
2 that that --

3 JUSTICE SOTOMAYOR: In designating
4 public functions, all it has to do is say we're
5 just going to tip it over the line a little
6 bit.

7 MR. DE LEEUW: Well, I don't think
8 that that's a particular concern.

9 JUSTICE SOTOMAYOR: Or keep away from
10 the line a little bit.

11 MR. DE LEEUW: There are -- first of
12 all, I don't know of many designated public
13 fora that are controlled by -- by independent
14 parties. Certainly, the traditional public
15 fora, I don't know of any either.

16 JUSTICE BREYER: Well, a prison, for
17 example?

18 MR. DE LEEUW: What's that? So
19 prisons are -- prisons are different. Prisons
20 -- prisons come along with the -- the West
21 versus Atkins case, where you have a
22 constitutional obligation and it's a
23 traditional and exclusive role of government to
24 -- to operate the prisons.

25 Mr. Chief Justice, I'd like to reserve

1 the rest of my time.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MR. DE LEEUW: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Hughes.

6 ORAL ARGUMENT OF PAUL W. HUGHES

7 ON BEHALF OF THE RESPONDENTS

8 MR. HUGHES: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 This is a public forum because New
11 York has generally opened property that it
12 controls for speech. New York has a general
13 access policy. That's -- this is its
14 first-come, first-served policy.

15 And I think the critical feature here,
16 which Petitioners cannot dispute, is that MNN
17 lacks discretion not to -- that they cannot
18 decline to run content that is protected by the
19 First Amendment.

20 CHIEF JUSTICE ROBERTS: Well, I think
21 they just did dispute it. I mean, getting to
22 Justice Breyer's questions, can they lump
23 things together? And can they say 5:00 is the
24 show on hot dogs? And if -- even if your show
25 on the subway was submitted prior to one on hot

1 dogs, the one on hot dogs is going to jump over
2 it?

3 MR. HUGHES: So -- so two things about
4 that, Your Honor. First, as Justice Breyer was
5 indicating, I think first-come, first-served
6 probably means what it says, that there's an
7 order to it.

8 But, second, even if there is a power
9 to schedule and to group things, I don't think
10 that has any bearing on whether or not this is
11 a policy of general access, because, in all
12 public forums, the government can impose
13 neutral time, place, manner restrictions.

14 CHIEF JUSTICE ROBERTS: Well, but it
15 seems to me a significant departure from
16 first-come, first-served in that they can --
17 the programming -- they're curating the
18 programming. They're saying, we're going to
19 have a show about this subject, and we're going
20 to put people who want to talk about it on,
21 surely in order, yes, the -- the first hot dog
22 show gets on before the third or fourth, but it
23 doesn't -- it's a significant departure from
24 that.

25 MR. HUGHES: Well -- well, let me use

1 an example, Your Honor, that may help. In --
2 in, for example, the Lamb's Chapel and Good
3 News Club, the Court looks to the use of
4 after-hours school classroom space and has
5 found that that's a -- a -- a public forum to
6 which the public forum rules attach.

7 But I don't think there's any dispute
8 that a school can say the Boy Scouts get to use
9 that school property on Tuesdays and the Girl
10 Scouts get to use that property on Wednesdays.

11 The critical feature that makes it a
12 public forum is that it's open to the public
13 such that anybody who wants to speak their
14 message has the ability to speak their message
15 in that forum.

16 JUSTICE BREYER: I don't -- I mean, my
17 goodness. Suppose that General Motors decides
18 that cars are controversial, and they want to
19 do something good for the city, so they open
20 their offices somewhere, an auditorium for
21 everybody to speak, and they say it'll be
22 first-come, first-served.

23 I mean, that wouldn't make General
24 Motors a public entity.

25 MR. HUGHES: No, of course not, Your

1 Honor, because public forums are limited to
2 those forums that the government itself chooses
3 to hold --

4 JUSTICE BREYER: All right. Now what
5 I have written down here, and I want to be sure
6 I'm not missing something.

7 MR. HUGHES: Yes, Your Honor.

8 JUSTICE BREYER: That these are the
9 features that they -- that -- that lead someone
10 to say it's not governmental or it is. All
11 right? One, the basic obligation is created by
12 law. That's on your side.

13 MR. HUGHES: Yes, Your Honor.

14 JUSTICE BREYER: All right. Two,
15 there are two appointed public directors, but
16 there are 11 who are not and are members of the
17 community. That seems to cut against you.

18 Three, it's paid for -- the cost is
19 paid for by the private entity but under
20 government compulsion. I don't know. I think
21 that cuts for you.

22 Four, that there isn't much discretion
23 in respect to what they run, but there is some.
24 They can decide subject matters as long as they
25 give people a fair chance.

1 And, five, which is not part of that,
2 but I'd love to hear what you have to say about
3 it, is there is for you a state remedy, and,
4 moreover, the existence and nature of that
5 state remedy is linked to the strength of your
6 basic argument here.

7 And so I am in a -- I'm -- I'm not
8 taking a side or the other.

9 MR. HUGHES: Yes.

10 JUSTICE BREYER: I'm suggesting that I
11 am genuinely uncertain about this, and I
12 brought out the issues to try to get you to
13 focus on them.

14 MR. HUGHES: Yes, Your Honor. So let
15 me take a few of these issues.

16 To -- to help clarify and to begin
17 perhaps with the directors issue. Our
18 principal theory of state action is that MNN is
19 performing the state function of administering
20 a public forum.

21 Our argument is not like, for example,
22 the situation in Lebron, where the Court found
23 that the private entity had become effectively
24 dominated by the public such that it was in all
25 events a public actor for everything it did.

1 That's not our argument.

2 Our argument is that it is performing
3 a public function insofar as it administers the
4 public forum.

5 It's like the example the Court was
6 discussing of a private theater that the
7 government leases, then sets the speech rules
8 on, and then it delegates administration.

9 It does not matter if the entity to
10 whom they delegate has a majority of the Board
11 of Directors as appointed by the state or none
12 of the Board of Directors appointed by the
13 state. It's doing the function that is the
14 critical point.

15 Coming to Your Honor's last question
16 about the state remedy, a few things to say
17 about the existence of the Public Service
18 Commission. The -- the -- the first thing is
19 there's been no contention that there is some
20 kind of exhaustion requirement or anything like
21 that that would be a legal obstacle to Section
22 1983.

23 Additionally, Petitioners -- or my
24 clients, Respondents, did, in fact, go to the
25 -- the Public Service Commission. They

1 received no remedy. That's described in a
2 letter that was submitted to the district
3 court, Docket No. 49 of -- in the district
4 court's docket. The Public Service Commission
5 gave no remedy in this context.

6 But I think it would be quite a
7 dangerous policy if the Court were to say that
8 a state could avoid constitutional obligations
9 by delegating them to a -- a private actor
10 insofar as it creates a state administrative
11 remedy to handle the claims that would parallel
12 constitutional rights.

13 I think it's easy to imagine that
14 states of all sorts could find that particular
15 states have disfavored constitutional rights
16 and determine that, if they could handle or
17 delegate their administration to private actors
18 and then set up a state administrative scheme,
19 I think this Court would -- would find that
20 that's not a way in which states or localities
21 can obviate any of the constitutional
22 protections from the First Amendment on.

23 JUSTICE KAVANAUGH: You referred to
24 public function. But, under our cases, it has
25 to be a traditional public function, something

1 that's traditionally exclusively been a public
2 function.

3 MR. HUGHES: Yes, Your Honor.

4 JUSTICE KAVANAUGH: How do you suggest
5 that this qualifies under those precedents?

6 MR. HUGHES: So, Your Honor, I think
7 what the exclusive public function test looks
8 to is really two factors.

9 First, is this the kind of function
10 that requires a delegation of state sovereign
11 authority? If it is, it's the kind of thing
12 that exclusively states can do. If it's not,
13 it's something exclusively states can't do.

14 The second factor that -- that pairs
15 with that is, is this the kind of function that
16 has express constitutional obligations attached
17 to it? Those are the circumstances, for
18 example, when the government exercises the
19 eminent domain authority that the Court in
20 Jackson said is an example of public function.
21 It's only something the state or the state's
22 delegate can do, and it has express
23 constitutional obligations that attach to it.

24 Administering a public forum is of the
25 same character. It requires either the state

1 doing it itself or the state delegating its
2 sovereign authority to administer the public
3 forum. And there are specific constitutional
4 obligations that arise under the First
5 Amendment that attach to that.

6 Now I think what Petitioner suggests
7 is that you can get around the --

8 JUSTICE KAVANAUGH: I don't understand
9 why leasing or operating a public access
10 channel is -- is akin to one of these
11 traditional public functions that are described
12 in the cases. Help me with that.

13 MR. HUGHES: Yes, Your Honor. And so
14 what I think matters is can you look at the
15 function and find those two criteria I just
16 mentioned satisfied.

17 I think there's the problem with
18 Petitioners' argument that, if you just relabel
19 it in a way that doesn't meet those criteria,
20 that would, I think, effectively undermine the
21 public function test.

22 If we look to West, for example, the
23 Court found that there was a public function of
24 treating inmates who are in state custody.

25 Now what was the actual function that

1 was being performed? Well, it was a doctor who
2 was providing --

3 JUSTICE KAVANAUGH: Why isn't this --

4 MR. HUGHES: -- orthopedic services.

5 JUSTICE KAVANAUGH: Sorry to
6 interrupt. Why isn't this more like a utility
7 in Jackson where, let's say, all editorial
8 discretion's been taken away, and then you're
9 operating, in essence, like a utility, and the
10 Court there was very careful to say that wasn't
11 -- even though heavily regulated, that wasn't
12 good enough?

13 MR. HUGHES: Both the two factors that
14 -- that I think are necessary for exclusive
15 public function are missing in the utility
16 context. There is no delegated state sovereign
17 authority that's required to run a utility.
18 Private companies can and do run utilities. So
19 running a utility does not require sovereign
20 authority.

21 And, second, there's no constitutional
22 protections that attach to the specific act of
23 running a utility.

24 That's unlike the context of
25 administering the public forum, where

1 administering the public forum does have --
2 require the exclusive sovereign act and does
3 have specific --

4 JUSTICE KAGAN: Does --

5 MR. HUGHES: -- constitutional
6 obligations.

7 JUSTICE KAGAN: -- does your position
8 depend on our finding a governmental property
9 interest and, if so, what is the interest?

10 MR. HUGHES: Your Honor, I think our
11 position is certainly strengthened by the fact
12 that the government controls in all relevant
13 respects.

14 We do think that the Court needs to
15 draw lines between where the government can
16 designate a property as public forum and -- and
17 -- and where it cannot.

18 And one line that's been suggested by
19 Justice Thomas's opinion in Denver Area is a
20 place, a property where the government can
21 legitimately control as its own. And that can
22 either be because it owns the property itself
23 or because it has an exclusive legal interest
24 in that property where it can set the rules of
25 speech and legitimately treat it as its

1 property that it controls.

2 So I --

3 CHIEF JUSTICE ROBERTS: Your -- your
4 idea that you can control, is that based solely
5 on your power which your -- your friend called
6 into question to terminate the operator?

7 MR. HUGHES: So it's -- it's several
8 things, Your Honor, just to walk through how
9 this -- where the control comes from.

10 First, it's the state and the city
11 that decide even if public access exists. They
12 create it then through negotiations with the
13 cable companies.

14 The cable companies would not even
15 create this interest --

16 CHIEF JUSTICE ROBERTS: Okay. But
17 jump ahead to we've got somebody in place.

18 MR. HUGHES: Well, once we have
19 somebody in place, many cities in New York run
20 this themselves. They administer it themselves
21 as a branch of state and local government.

22 And in those circumstances where they
23 administer it under the state, exact same state
24 regulatory regime themselves, I think there's
25 little question in those contexts that it is

1 controlled in all --

2 CHIEF JUSTICE ROBERTS: Okay. Well,
3 jump ahead again to this case.

4 MR. HUGHES: Yes, Your Honor. And
5 then, in this case, they have taken the extra
6 step, instead of controlling it themselves, of
7 delegating it out to a third-party.

8 Here, however, the city has retained
9 for itself exclusive authority to decide if
10 they wish to terminate that administration.

11 CHIEF JUSTICE ROBERTS: Right. And --
12 and your argument is that that greater power
13 necessarily includes all the lesser powers?

14 MR. HUGHES: It -- yes, Your Honor, it
15 does.

16 CHIEF JUSTICE ROBERTS: So, because
17 you have the power to terminate, you have the
18 power to select programming?

19 MR. HUGHES: Your Honor, it's -- I'm
20 not sure the city has the -- they've delegated
21 that power to select programming in -- in the
22 short term, but, again, there's really no power
23 to select programming because anybody's program
24 who wants to be -- who wants to run --

25 CHIEF JUSTICE ROBERTS: Well, we've

1 already established that there's some wiggle
2 room at least in that since you can have the
3 hot dog program, and you can have the subway
4 program, regardless of whether the subway
5 people wanted their shows before the hot dogs.

6 MR. HUGHES: The critical thing is, if
7 the hot dog program wants to come on, there's
8 nothing MNN can do to say you cannot access
9 this forum.

10 It's the same way of going to Central
11 Park. If you're, you know, the hot dog speaker
12 and you want to go to Central Park and speak
13 that message, you have the right to do so
14 because it's a policy of general access.

15 JUSTICE ALITO: But your -- your brief
16 puts a lot of weight on the fact that this is a
17 -- this has to be first-come, first-served.

18 But suppose it wasn't. Suppose MNN
19 had discretion to decide which programs to
20 accept. What would the result be then?

21 MR. HUGHES: If it has discretion so
22 it can exercise editorial control, then it
23 would not be a public forum.

24 JUSTICE BREYER: Editorial control.
25 See, here is -- if I think back, maybe you can

1 help me with this. Looking at it in a broader
2 way and saying that the First Amendment is
3 interested in a multiplicity of ideas, a
4 multiplicity, that's the marketplace idea, now
5 I don't know which way to go.

6 I'm sure one thing that would help in
7 this direction is having some channels, such as
8 first-come, first-served.

9 But I also think people might turn
10 those off and another way to do it is to allow
11 a lot of different Internet owners or Internet
12 providers or et cetera, et cetera, to choose a
13 lot of different ways, and they will have
14 different views.

15 Maybe there should be a mix of ways of
16 bringing different views to the public. And
17 I'm frightened in deciding for you that it
18 would be too rigid, and before you know it,
19 everybody, where there's something that looks
20 like a public forum run by private companies,
21 would have the kind of access that you may well
22 have here.

23 MR. HUGHES: And --

24 JUSTICE BREYER: You see, that's -- so
25 -- so what do you -- have you ever thought

1 about that? What is the --

2 MR. HUGHES: Yes, Your Honor, and let
3 me address that directly, because, in our view,
4 the states and localities have complete control
5 as to decide whether they want to have a system
6 that New York has that leads to these First
7 Amendment consequences or if they prefer to
8 have a system, for example, as California has.

9 California has no first-come,
10 first-served requirement. And when you look
11 how the Los Angeles public access station is
12 organized, there, there is no right -- if
13 you're the hot dog person and you want to put
14 your video on, you have to get through a
15 board --

16 JUSTICE ALITO: Well, this --

17 MR. HUGHES: -- that exercises
18 control.

19 JUSTICE ALITO: -- this comes back to
20 what I wanted to follow up with on the question
21 that I asked before. It seems strange to me to
22 say that if the policy is first-come,
23 first-served, no editorial discretion,
24 therefore, no viewpoint discrimination, the
25 First Amendment applies, but if there's

1 discretion and the administrator has the
2 authority to engage in viewpoint
3 discrimination, the First Amendment doesn't
4 apply. It seems exactly backwards.

5 MR. HUGHES: Well, Your Honor, I think
6 it just depends if the state/locality has
7 chosen to create a public forum. It has its
8 discretion as to whether or not it wishes to
9 create a public forum in a place.

10 For example, going to the theater
11 circumstance. When the government leases a
12 theater, it has a choice to make. It can
13 organize the speech rules in that theater to
14 make it a public forum where anybody who wants
15 to speak their message has the right to do so,
16 or it can organize that theater and say: We,
17 the government, are going to decide who gets to
18 speak.

19 JUSTICE ALITO: If -- if the
20 government is running something and it allows
21 people to speak, it seems to me there -- there
22 are two possibilities. One, it's throwing this
23 open for anybody to speak, but if it's not
24 doing that, then what happens there is
25 government speech.

1 Now would you -- is this government
2 speech?

3 MR. HUGHES: No, Your Honor. I think
4 what's happening here is they've thrown it open
5 because of the --

6 JUSTICE ALITO: If -- all right. In
7 the situation where there's discretion, would
8 you say that it's government speech?

9 MR. HUGHES: Well, I think --

10 JUSTICE ALITO: So you're not -- you
11 just -- they -- they empower the administrator
12 to decide who's going to talk, and the
13 administrator chooses the viewpoints that it
14 likes. That is -- that's government speech?

15 MR. HUGHES: If -- so that would be a
16 private forum, Your Honor. If it's being
17 administered by the -- the state, then that
18 would be government speech, yes, Your Honor.
19 But we don't suggest that constitutional
20 obligations attach in that context because
21 there's no function of -- of administering a
22 public forum in that context.

23 So, if there's a delegation to a
24 private entity, a different result would
25 control, which is why, to answer Justice

1 Breyer's question, if the state chooses to
2 configure its public access channels in that
3 way, it would lead to a different result.

4 And our principle is simply the modest
5 one of states and localities should choose how
6 they get to configure their channels.

7 JUSTICE BREYER: It's not so modest,
8 because it seems to me what would make sense
9 here is that you have to go to the state.
10 You're claiming that you come here because
11 there is the very obligation that you want,
12 imposed by state law and the state.

13 MR. HUGHES: But --

14 JUSTICE BREYER: And that's the reason
15 you're up here. But I don't know of any
16 doctrine -- this is on your side. I mean, I
17 don't know of any doctrine that says that you
18 have to go to the state. And, therefore, we're
19 not -- I had Justice Alito's problem. I think
20 that was his problem. You're right if and only
21 if you have an excellent state cause of action.

22 MR. HUGHES: But, Your Honor -- and to
23 take the example of Good News Club and -- and
24 Lamb's Chapel --

25 JUSTICE BREYER: Yeah.

1 MR. HUGHES: -- and school access
2 cases, and Christian Legal Society and all of
3 those cases, those are cases that turn on
4 underlying state determinations.

5 The -- this Court was clear in Good
6 News Club. The state -- the -- the school
7 district did not have to create a policy of
8 general access. That was a state decision or
9 school district decision. But, once that local
10 government made that decision, it had a policy
11 of constitutional consequence.

12 So, although there is certainly, I'm
13 sure, a way to go to the school district and
14 complain about the -- the -- the fact that they
15 were discriminating against unpopular religious
16 organizations, they also had a First Amendment
17 claim, which this Court heard and vindicated.
18 So --

19 JUSTICE SOTOMAYOR: So can you explain
20 the flip of what I think may be troubling -- I
21 may be wrong -- Justice Breyer is -- and -- and
22 Justice Alito? If this is the administrator
23 for the state -- I know you sued the state, the
24 city here, but you then dismissed your case
25 against it.

1 MR. HUGHES: Right.

2 JUSTICE SOTOMAYOR: Could you have
3 just sued the city and not MNN?

4 MR. HUGHES: There was a claim
5 initially brought against the city that was
6 dismissed for failing to show the city directly
7 caused this under Monell. We certainly don't
8 challenge that argument. I don't believe there
9 is a claim against the -- the city in this
10 circumstance.

11 What has happened --

12 JUSTICE SOTOMAYOR: So you think the
13 city would be protected by Monell theories?

14 MR. HUGHES: I think that's right,
15 Your Honor, because the actor who's choosing to
16 -- to engage in the activity that's -- engaging
17 in viewpoint discrimination is MNN in this
18 context, but they are acting --

19 JUSTICE SOTOMAYOR: Its agent, its --
20 its administrator as agent?

21 MR. HUGHES: That's -- that's correct,
22 Your Honor. Yes, Your Honor.

23 JUSTICE SOTOMAYOR: So it would be
24 like the police officer who uses excessive
25 force?

1 MR. HUGHES: Correct, Your Honor.

2 Yes.

3 JUSTICE KAGAN: Where -- where's the
4 line that -- that you think -- I mean, what you
5 said, essentially, is the -- the administrator
6 has no discretion. But suppose the city gave
7 the administrator some discretion. Where --
8 where's the -- where's the appropriate line?

9 I mean, suppose the -- the city --
10 suppose it weren't a complete public forum.
11 Suppose there were subject matter limitations.
12 Suppose that the -- the city gave the
13 administrator some discretion to decide within
14 particular areas which programs were better
15 than other programs.

16 Where is the line that this starts
17 becoming not a public forum in your view?

18 MR. HUGHES: So -- so this just turns
19 on the Court's limited and unlimited public
20 forum cases. And the underlying question is,
21 is it a policy of general access or selective
22 access?

23 Now general access in what the Court
24 calls limited public forums, the government can
25 put some sort of fence around what is the

1 permissible speakers or permissible message.
2 For example, in the Rosenberger context, the
3 public forum was a student activity fund, but
4 it was limited to student organizations that --
5 whose majority of members were UVA students.
6 So that was a limitation. But, within that
7 limitation, it was general access. Anybody
8 could seek to use that forum.

9 If, however, within that limitation
10 there is still additional discretion, then it
11 becomes a forum of selective access, for
12 example, like the debate circumstance in
13 Arkansas educational, because there was
14 still -- even if you qualified within the rules
15 that the -- the government established, there
16 was still additional discretion on top.

17 The critical question is whether or
18 not there is that discretion -- additional
19 discretion that's been reserved to the state.
20 And if there is that additional discretion,
21 then it becomes a forum of selective access
22 rather than general access, and this Court has
23 held that does not qualify as a public forum in
24 the constitutional sense.

25 JUSTICE BREYER: Go back to Justice

1 Sotomayor for a question. You said you didn't
2 have a suit against the city. But what about a
3 suit or some kind of administrative proceeding
4 against M -- is it MNN, whatever you call it --
5 how do you -- MM?

6 MR. HUGHES: MNN.

7 JUSTICE BREYER: MNN. Did you have an
8 action against them, either administratively,
9 it would be on the ground that they're not
10 administering the first-come, first-served
11 policy, or in a state court?

12 MR. HUGHES: Well, so, Your Honor,
13 what Petitioners have suggested is that we turn
14 to the Public Service Commission. And at the
15 Docket 49 in the district court, we explained
16 that our clients did turn to the Public Service
17 Commission and they were afforded no remedy.
18 The Public Service Commission, as I understand
19 it, told them that this was not the kind of
20 claim that they would hear.

21 Now this is not in the record --

22 JUSTICE ALITO: Could you get court
23 review of that under New York law?

24 MR. HUGHES: Sorry, Your Honor?

25 JUSTICE ALITO: Can you get court

1 review of that adverse decision by the Public
2 Service Commission?

3 MR. HUGHES: I'm not aware of any
4 private cause of action in that context, Your
5 Honor. But it does go to the broader question
6 of if there is a First Amendment claim -- I
7 think this is parallel to the school access
8 cases and others -- the Court has never said
9 even if a state creates a parallel cause of
10 action that that somehow displaces the core
11 constitutional --

12 JUSTICE BREYER: No, no, but I want to
13 know what you think on this, because it could
14 be that this rule, first-come, first-served, is
15 just hortatory, if there's no remedy for it.

16 MR. HUGHES: Well, Your Honor, I think
17 it's the --

18 JUSTICE BREYER: Or a violation of it.
19 You're saying they violated it. All right.
20 What's your remedy? And if there's no remedy,
21 what kind of a rule is it?

22 MR. HUGHES: Well, a few things to say
23 about that, Your Honor.

24 First, Petitioners point to the Public
25 Service Commission case of Amano, which they

1 suggest shows that they have discretion.

2 But, when you read Amano, that's --
3 which is the regulator here, it says the reason
4 that Brooklyn's access stations were
5 permissible is because they had channels that
6 were operated on a first-come, first-served
7 basis, and that the -- the petitioners in Amano
8 had not pointed to any content that anybody had
9 asked that channel to run that was not actually
10 put over the airwaves. So that was the -- the
11 rule that was directed -- established by the
12 Public Service Commission.

13 But beyond that, the regulation -- the
14 state law is plain on its face. It's an
15 obligation of state law and it's also built
16 into the contracts.

17 So I -- I think the -- the law, the
18 directive of the state is -- is quite clear.
19 The city and the state had the ability to
20 choose the rules of speech for that particular
21 forum. They have chosen those expressly with
22 first-come, first-served.

23 Petitioners, again, have not -- I
24 don't think can deny that the -- the
25 straightforward premise that if somebody wants

1 to bring the hot dog speech or any of that kind
2 of speech, that -- that they must run that
3 speech. They cannot decline to do so.

4 JUSTICE BREYER: I'm your client. Do
5 I have a remedy in state court or not? What
6 are the odds?

7 MR. HUGHES: I'm not aware of any
8 remedy that you would have in state court, Your
9 Honor. I -- I don't know that there is any
10 administrative-style remedy against the Public
11 Service Commission.

12 JUSTICE KAVANAUGH: You --

13 MR. HUGHES: So --

14 JUSTICE KAVANAUGH: You've referred a
15 few times to the school access cases. Of
16 course, those were government property, right?

17 MR. HUGHES: That's right, Your Honor.
18 So I think our --

19 JUSTICE KAVANAUGH: So, here, just to
20 make sure I'm following, MNN is a private
21 company, correct?

22 MR. HUGHES: Yes, Your Honor.

23 JUSTICE KAVANAUGH: And operating a
24 channel on a cable system that's also private,
25 privately owned?

1 MR. HUGHES: Yes, Your Honor.

2 JUSTICE KAVANAUGH: And it's heavily
3 regulated by the state, right? So it's not
4 government property. It's not operating on
5 government property. It's just heavily
6 regulated in terms of being forced how it --
7 how it performs its functions, which, again,
8 coming back to the utility and everything we
9 said in Jackson on that front, but I -- I just
10 don't think the school access cases help you
11 because they assume the conclusion.

12 MR. HUGHES: Well, Your Honor --

13 JUSTICE KAVANAUGH: It's government
14 property there. No one disputes it.

15 MR. HUGHES: Well, two things just
16 about the school access cases. I agree that
17 this case presents the question of if, in the
18 school district and Good News Club interpose a
19 nonprofit, if the Court would get to a
20 different result. I don't think the Court
21 would.

22 But, to come back to the second point
23 about the property interests, I think there are
24 two separate property interests that are issues
25 with what the Court identified in Turner.

1 There's no doubt that the cable
2 operator has a property interest in their
3 physical cable system over which this is all
4 distributed. And they certainly have rights to
5 that, including First Amendment rights.

6 Those are claims that would have to be
7 brought by the cable operator or arguments that
8 would be advanced by the cable operator.

9 JUSTICE KAVANAUGH: My point is simply
10 it's a private company operating a channel on
11 another private company's system, and it's
12 forced in terms of how it exercises its
13 discretion to do so in a particular way by the
14 government.

15 But that just means it's heavily
16 regulated in terms of its editorial discretion.
17 You're melding, I think, the public forum
18 question with the state action question.

19 MR. HUGHES: Well, I think the
20 utility, though, that Your -- Your Honor's
21 referencing is -- is akin to the cable
22 operator. And so that might be an argument
23 that would be relevant to the cable operator.

24 JUSTICE KAGAN: I think the question,
25 Mr. Hughes, is what property interest does the

1 government have?

2 MR. HUGHES: Yes, and so -- so, to get
3 to that, Your Honor, thank you, the property
4 interest that is -- is quite distinct here is
5 the interest in the channel. It's the interest
6 that the government has obtained to be able to
7 place specific content on particular channels
8 that the city --

9 JUSTICE KAGAN: And it obtained that
10 interest when it gave the rights-of-way to the
11 cable operator, is that right?

12 MR. HUGHES: Yes, Your Honor.

13 JUSTICE KAGAN: What it took back or
14 what it reserved for itself was a property
15 interest in these public access channels?

16 MR. HUGHES: Yes, Your Honor, in the
17 franchise agreement, part of the quid pro quo
18 agreement where the -- the city gives the cable
19 operator the access to public rights-of-way,
20 which is critical to them constructing their
21 system. In exchange, the city obtained the
22 rights to have control over a select number of
23 channels. And so that is the particular right
24 that's at issue.

25 JUSTICE KAGAN: So what you're saying

1 is this is not just a lot of regulation. This
2 is a property interest that the city reserved
3 for itself when it gave over the rights-of-way
4 that the cable company needs to do anything?

5 MR. HUGHES: Absolutely, Your Honor.
6 That's --

7 CHIEF JUSTICE ROBERTS: Tell me --

8 JUSTICE KAVANAUGH: But doesn't that
9 have --

10 CHIEF JUSTICE ROBERTS: -- what is the
11 interest that it reserved for itself?

12 MR. HUGHES: The interest it reserved
13 for itself is to control a select number of
14 channels and to place the content that it
15 wishes over those channels.

16 In many cities in New York, like
17 Buffalo and Scarsdale and others, the cities
18 have retained that property interest and
19 operate, administer that property interest
20 themselves.

21 The question in this case is when they
22 administer -- when they delegate that
23 administrative right.

24 CHIEF JUSTICE ROBERTS: Where -- where
25 does it say that they retain the interest over

1 the content on the channel?

2 MR. HUGHES: Sorry, on -- on -- when
3 -- when the administration of the delegation
4 occurs, Your Honor?

5 CHIEF JUSTICE ROBERTS: Yeah, I
6 thought that's where you were telling me they
7 reserved that property right. And I just
8 wonder, where -- where is there anything that
9 says that extends to what's -- what appears on
10 the channel?

11 MR. HUGHES: Well, so, Your Honor,
12 what has happened in this context is the city
13 has set the speech rules, which includes the
14 first-come, first-served, which we believe is
15 critical.

16 CHIEF JUSTICE ROBERTS: Okay. I
17 believe it may be critical as well. And as far
18 as I can tell, there seems to be a significant
19 factual dispute over what first-come,
20 first-served actually means.

21 You agree it doesn't actually mean
22 first-come, first-served? I mean, if they're
23 -- if they've got a program on the subways and
24 somebody says my -- you know, my show about
25 something else was submitted first, well, too

1 bad, you can show that tomorrow.

2 So first-come, first-served sounds
3 good, but it doesn't mean what it says.

4 MR. HUGHES: What it means is it's
5 general access, Your Honor. That's what's
6 critical, is it means that it's general access.

7 And -- and let me say, though, take
8 the public park example where, if the city
9 delegates authority of public park and they say
10 the rules -- the speech rules here is this is
11 general access, you can't engage in viewpoint
12 discrimination, and we're going to delegate all
13 administrative function.

14 That -- the Court would not look to
15 see whether or not they've reserved for
16 themselves the ability to override particular
17 one-off decisions. The point is they've
18 delegated the function of making -- of -- of --
19 of controlling access to a public forum.

20 CHIEF JUSTICE ROBERTS: So whenever it
21 says --

22 JUSTICE BREYER: Talk more --

23 CHIEF JUSTICE ROBERTS: In -- in your
24 brief, whenever it says first-come,
25 first-served, I should substitute the words

1 "general access"?

2 MR. HUGHES: That's what we -- is the
3 relevance of first-come, first-served, yes,
4 Your Honor, to us.

5 JUSTICE KAVANAUGH: So, if the
6 government imposes a first-come, first-served
7 requirement on a private company --

8 MR. HUGHES: So I think that's a very
9 different --

10 JUSTICE KAVANAUGH: -- what happens
11 then? Because that's some of the
12 hypotheticals, as you know, raised in the amici
13 briefs about Twitter and YouTube and the like.

14 MR. HUGHES: Absolutely.

15 JUSTICE KAVANAUGH: So what's --

16 MR. HUGHES: Absolutely, Your Honor.
17 So, of course, there has to be a balance
18 between the sovereign's authority to designate
19 non-traditional forums and -- and private
20 property.

21 There are two ways the Court can
22 approach that. The one way is --

23 JUSTICE KAVANAUGH: But I thought you
24 said to the Chief Justice that the reservation
25 of first-come, first-served is what gave you

1 the property interest.

2 MR. HUGHES: Yeah. I think, though,
3 Your Honor, there is a limitation on the
4 government's authority to impose that kind of
5 speech rule on property that does not control.
6 This is property that does control.

7 JUSTICE KAVANAUGH: Well, that's --
8 that's -- but what gave you the property
9 interest if it's something other than the
10 first-come, first-served? It seems certain --

11 JUSTICE KAGAN: What gives you the
12 property interest is that you've given over the
13 rights-of-way and you've kept access to -- to
14 -- you've kept the rights to determine how to
15 use public access channels. And you can do
16 that yourself or you can use an administrator.
17 Is that correct?

18 MR. HUGHES: Yes, Your Honor. It's
19 the franchise agreement that gives that
20 property right that you can control, yes. Yes,
21 Your Honor. And so this is distinct from the
22 private property where one attempts to impose a
23 first-come, first-served requirement on private
24 property, which is a completely different case
25 and I think it would be a different outcome.

1 JUSTICE KAVANAUGH: So, if a utility
2 gets rights-of-way from the local government,
3 does that give the local government the -- does
4 that make the utility a state actor?

5 MR. HUGHES: I -- I don't think it
6 makes the utility a state actor in that context
7 because there's no performance of the public
8 function that requires, again, delegated
9 sovereign authority in exercise of something
10 that is carefully tied to a constitutional
11 obligation. That's just not happening in the
12 utility context under this context.

13 JUSTICE KAVANAUGH: The language --
14 I'm repeating myself -- but the language that
15 we've used in the cases is traditionally
16 exclusively a public function. And I'm not
17 sure -- it's not even true in this case, right,
18 in other states, other localities, these public
19 access channels are not run by --

20 MR. HUGHES: But -- but, Your Honor,
21 that's, again, why I don't think one can define
22 this away by coming up -- by plucking out some
23 activity that's not traditional. It's what is
24 the authority that's necessary to do what the
25 state is doing -- or what the private actor is

1 doing.

2 The authority that's absolutely
3 necessary is the authority to administer the
4 public forum that has to come from the state
5 and has constitutional obligations that stack
6 up behind that.

7 And that's -- so, again, as I said
8 earlier, if -- if one were to look to West, you
9 could redefine the function as providing
10 orthopedic services, and, of course, that's
11 something that wouldn't meet the test standing
12 alone.

13 What matters is did the doctor
14 performing those services in the context of
15 that particular case have to exercise delegated
16 sovereign authority, and the answer there is
17 yes.

18 JUSTICE KAVANAUGH: But you -- you
19 agree -- if you prevail here, you agree that it
20 would be different if it were a private company
21 -- we all agree it's a private company -- that
22 operates in open forum, Justice Breyer's
23 General Motors example.

24 MR. HUGHES: Absolutely.

25 JUSTICE KAVANAUGH: The government

1 can't require first-come, first-served on that,
2 and --

3 MR. HUGHES: Absolutely, Your Honor.
4 And that's either because there's a blanket
5 rule saying you cannot impose a public forum on
6 government -- on property the government cannot
7 control, or one would look to Justice
8 Rehnquist's opinion in PruneYard, where Justice
9 Rehnquist says there are takings and compelled
10 speech problems.

11 I think those two results probably --
12 those two approaches probably come to the same
13 result. But I agree with Your Honor that would
14 be a different case and would not be
15 permissible.

16 JUSTICE BREYER: But it's not so
17 clearly different because, in the United
18 States, there are vast numbers of different
19 kinds of arrangements between government and
20 private people, ranging from agency to General
21 Motors.

22 And, of course, if you say public
23 park, if that's what it is, you win in my
24 opinion. Okay. But it's not. And is it
25 Southern Pacific Railroad, which was regulated

1 for many years? And what am I getting into?

2 You see, that -- that's such a general
3 question, and I don't know if you have a
4 thought on that.

5 MR. HUGHES: Just very brief, Your
6 Honor. Our argument is limited to the context
7 of public forums and the administration of
8 public forums being state action, and -- and
9 our argument goes no further than that. Thank
10 you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Four minutes, Mr. De Leeuw.

14 REBUTTAL ARGUMENT OF MICHAEL B. DE LEEUW
15 FOR THE PETITIONERS

16 MR. DE LEEUW: Thank you. So just to
17 -- to hit a couple of points. Respondents'
18 view of the public function test would be a
19 radical expansion of what this Court has held
20 before to be the public function test.

21 And I think a good way of looking at
22 it is that they're asking this Court to find a
23 public function as the -- as the operation of a
24 public forum when the very specific thing that
25 we do, which is the operation of a public

1 access channel, is something that the City of
2 New York has never done, and it certainly,
3 going back to Denver Area, has never been a
4 traditional and exclusive function of
5 government.

6 One question about the PSC. We -- we
7 never received a complaint from the PSC that
8 the Respondents had brought any claim against
9 us.

10 There is a remedy if the PSC, if you
11 believe that the PSC is not operating
12 correctly, it's called Article 78 in New York,
13 and you can bring such a claim if you believe
14 that the -- that the -- the Public Service
15 Commission is not -- not operating.

16 This is not a delegation of a
17 constitutional obligation, as in West and
18 Atkins. This is not a -- there -- there -- in
19 West, there is an Eighth Amendment obligation
20 for the state to perform -- to -- to provide
21 medical care for its -- for its prisoners.

22 There's nothing like that here. The
23 -- the PSC regulations put the obligations on
24 the cable company, not on the city. So this is
25 like Jackson and it's like Sullivan because

1 those -- the -- the -- the party that is
2 obligated to provide public access channels is
3 the cable operator.

4 And in the first instance, it's got to
5 operate them unless and until the city decides
6 to -- to delegate a third-party, which is not
7 an agent of the city but a third-party. Again,
8 the --

9 JUSTICE SOTOMAYOR: But the city
10 retained the right in the franchise agreement
11 to dedicate this to the public use?

12 MR. DE LEEUW: Well, I want to --

13 JUSTICE SOTOMAYOR: To designate this
14 a public forum?

15 MR. DE LEEUW: Well, the -- the -- the
16 franchise agreement does not dedicate this as a
17 public forum. It says that these channels
18 shall exist. It does not say that this is
19 going to be a constitutional public forum.

20 And it could have done that by
21 delegating it to a government entity, as my
22 friend says happens in other places in New
23 York. It didn't do that.

24 It could have done that by dominating
25 the Board of MNN. It didn't do that. It could

1 have done it by requiring that MNN's policies
2 be reviewed by the city. It didn't do that.

3 None of those things are present here.
4 This is a company that was delegated -- that
5 was designated to operate these channels 28
6 years ago, and the city hasn't come and said
7 anything to us about how we operated.

8 They have left us alone. We're a
9 private company. And we are not -- we -- we
10 are not a state actor under any of this Court's
11 tests.

12 Just quickly, the Good News Club and
13 all of the school access cases, those not only
14 involve government property, but the defendants
15 in those cases were government actors, clear as
16 day they were government actors. And it was,
17 in fact, you know -- so -- so when you're
18 looking at the -- the who is responsible for
19 the challenged conduct, it's very clear that it
20 was the government.

21 Here, that is not the case. Here, in
22 order to find that there -- that the challenged
23 conduct was caused by the government, you first
24 have to find out that we are a state actor
25 under one of this Court's tests.

1 We're asking this Court to apply its
2 state action tests the way it always has, and
3 the Respondents are asking for this Court to
4 apply them in a radically new way.

5 Thank you very much.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 11:05 a.m., the case
9 was submitted.)

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