No. 17-1702

In the Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, & CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK & JESUS PAPOLETO MELENDEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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STATEMENT

New York City has chosen to designate its public access television channels as public forums: As mandated by state law, its channels are free for residents to use; the network must display residents' noncommercial videos on a first-come, first-served basis; and the cable operator can refuse to carry content only if it is material unprotected by the First Amendment. State law thus prohibits public access channels from exercising editorial control.

Most other states and municipalities take a very different approach to their public access television channels. We have uncovered just one other state (Rhode Island) with a first-come, first-served law like New York's. Throughout the rest of the country, public access channels can and do exercise editorial control. Tennessee, for example, restricts public access television to content of local interest. Los Angeles uses an editorial board to curate content.

Thus, whereas New York has chosen to designate its public access channels as public forums, most other state and local governments have not.

Petitioners do not seriously dispute that, if New York's public access channels *are* public forums, petitioners' regulation of them is state action. Indeed, that point is elementary. If a municipality delegates administration of its public sidewalks to a nonprofit corporation, regulation of those sidewalks is still bound by the First Amendment.

None of this is a surprise to petitioner Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network (MNN). Per its mission statement, MNN's *raison d'être* is to "ensure the ability of Manhattan residents to exercise their First

Amendment rights * * * on an open and equitable basis." Pet. App. 37a. In view of this acknowledged purpose, this petition—which asserts that the First Amendment does not apply at all—is nothing short of extraordinary.

In attempting to paint this case as worthy of further review, petitioners rely on a false premise. The petition rests on the contention that the decision below holds that *all* public access channels are public forums. The questions presented turn on this assertion, and it pervades the entirety of the petition.

That is fundamentally incorrect. The decision below is tethered to New York's particular legal "framework"; the court stated explicitly that it was *not* "determining whether a public access channel is necessarily a public forum" in all contexts. Pet. App. 13a. Nor could the decision bind elsewhere. The significant distinctions in state and local law—especially whether there is a first-come, first-served law—drive different results.

In sum, the particular choices state and local governments make determine whether the First Amendment applies to a public access channel. That conclusion is neither surprising nor concerning.

Petitioners, by contrast, would run roughshod over local autonomy, denying state and municipal governments the discretion to determine whether their public access channels qualify as public forums. The Court should reject petitioners' request to impose an inflexible, one-size-fits-all policy on every local government. Congress allowed for local decision making; those decisions should now be respected.

The Court should deny the petition.

A. Legal background.

This case sits at the intersection of two doctrines: the First Amendment's robust protection of public forums and the Fourteenth Amendment's state-action requirement.

1. First Amendment protections are at their zenith in public forums. Content-based speech restrictions in public forums must pass strict scrutiny. *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

There are "traditional" and "designated" public forums. Traditional public forums inherently exist; they are "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks." *United States* v. *Grace*, 461 U.S. 171, 177 (1983). The government creates a designated public forum by "intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). A designated public forum need not be a physical location. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

2. The First Amendment binds state actors. But state actors are not limited to government entities. Sometimes, "an ostensibly private organization or individual" takes an action that "may be fairly treated as that of the State itself." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Since the "Fourteenth Amendment is not [then] to be displaced," the Constitution applies to private action "fairly attributable" to the government. *Ibid.*

Whether private activity qualifies as state action is "necessarily [a] fact-bound inquiry." *Brentwood*, 531 U.S. at 298. An entity may be deemed a state actor when it is "coerc[ed]" or "significant[ly] encourage[ed]" by the government (*Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982) (the "compulsion test")); when it "is 'entwined with governmental policies'" (*Brentwood*, 521 U.S. at 296 (quoting *Evans* v. *Newton*, 382 U.S. 296, 299 (1966)) (the "entwinement test")); or when, despite its label, it really just is a government agency (*Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995)).

Another framework, the "public function test," is especially relevant here: "When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become * * * subject to its constitutional limitations." *Evans*, 382 U.S. at 299. The test is satisfied by functions that are "traditionally the exclusive prerogative of the State." *Jackson*, 419 U.S. at 353.

B. Public access television.

To operate in a particular region, "[c]able operators must obtain franchises from local governments to lay the cable or optical fibers needed to reach subscribers." Pet. App. 35a. When local governments extend cable franchises, they usually require cable providers to dedicate public access channels. *Ibid.*

Although federal law partially regulates these channels, they are "run in various configurations" under differing state and local regimes. Pet. 21-22. Some municipalities (like New York State) have adopted laws obligating the public access channel to air videos, without charge, on a first-come, first-served basis. Other governments have not. There are

also significant differences in who operates the public access channels: nonprofit organizations, cable companies, or even the local governments themselves may operate them. *Id.* at 22 n.5.

1. Federal law empowers and favors public access channels. When Congress established a national policy for the cable industry, it expressly gave local governments the right to require "that channel capacity be designated for public [use]." 47 U.S.C. § 531. Congress intended these channels to be an "electronic marketplace of ideas"—"the video equivalent of the speaker's soap box," "available to all, poor and wealthy alike." H.R. Rep. No. 98-934, at 30, 36 (1984).

Congress did not, however, mandate the creation of public access channels, nor did it dictate the terms on which those channels must operate. Rather, Congress left to state and local governments significant discretion as to individual policies.

2. In response to federal law, New York State has adopted one model for public access channels.

New York State law obligates local governments to establish a public access channel when issuing cable franchises. N.Y. Comp. Codes R. & Regs. tit. 16, §§ 895.1(f), 895.4(b)(1).[1] In doing so, the municipality must designate an "entity" to operate the channel. *Id.* § 895.4(c)(1).

New York State law, moreover, imposes certain requirements on the administration of public access channels. The entity operating the channel must car-

[1] Cable operators whose systems have fewer than 36 channels are exempt from this requirement. Pet. App. 4a.

ry all noncommercial content on a "first-come, first-served, nondiscriminatory basis." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(4). And the entity must run this material "without charge to the user." *Id.* § 895.4(c)(6). See also Pet. App. 4a.

The State thus prohibits exercise of editorial control over public access content. Likewise, the cable franchisee "shall not exercise any editorial control"—*unless* the "content" is "unprotected by the First Amendment." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(8). And "[a] municipality shall not exercise any editorial control over any use by the public of a public access channel except as may be permitted by law." *Id.* § 895.4(c)(9).

State law also obligates public access channels to open significant aspects of their records to public inspection. In New York, the "entity responsible for the administration of a public access channel" must "maintain a record of the use of such channel." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(10). The entity must record "the names and addresses of all persons using or requesting the use of any such channel," and it must make this information "available for public inspection for a minimum of two years." *Ibid.*

3. In establishing cable franchises, New York City has adhered to these state-law obligations. The City obligates cable franchisees to provide public access channels; in Manhattan, it has delegated administration of those channels to petitioner MNN; it requires cable franchisees to fund MNN via extensive grants; it compels MNN to adhere to the state-law-required "first-come, first-served" and "without charge" policies; and it retains partial direct control over MNN.

First, the City requires cable franchisees to dedicate channels for public access. The City, for example, has awarded a cable franchise in Manhattan to Time Warner. Am. Compl. ¶ 30 (D. Ct. Dkt. 39).[2] In the Franchise Agreement, the City obligated Time Warner to dedicate at least four channels for public use. Franchise Agreement § 8.1.1.[3] Time Warner must carry these channels to every customer. *Id.* § 8.1.6(a).

Second, the City has delegated administration of the public access channels to petitioner MNN. Pet. App. 36a-37a. In the Franchise Agreement, the City and Time Warner agreed that the Manhattan Borough President would "designate[]" a "nonprofit corporation" as the "Community Access Organization" that operates the public access stations. Franchise Agreement § 1.18. See also *id.* at § 8.1.7 to 8.1.12.

The City has designated petitioner MNN as the "Community Access Organization" for Manhattan. MNN therefore entered into a "CAO Agreement" pursuant to the model attached to the Franchise Agreement. See Pet. App. 37a; Franchise Agreement § 8.1.8 & Appendix C; Am. Compl. ¶ 33 (identifying and describing the Community Access Organization "CAO" Grant and Use Agreement by and Between Time Warner Entertainment Company, L.P. and Manhattan Community Access Corporation d/b/a

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[2] The City has also awarded cable franchises in Manhattan to Verizon and RCN Corporation, which are subject to similar requirements. Am. Compl. ¶ 35.

[3] The Amended Complaint (at ¶¶ 30-32) identifies and describes the Cable Franchise Agreement by and Between the City of New York and Time Warner Entertainment Company, L.P., which is available at perma.cc/UTP3-JW2Q.

Manhattan Neighborhood Network ("CAO Agreement"), perma.cc/63EZ-VYHY).

The CAO Agreement recounts that "the Franchise Agreement requires Time Warner Cable to make available * * * public access channels" and to provide "support payments and Cash Grants." *Id.* at 2. It further identifies that petitioner MNN "has been designated by the Borough President as the CAO to receive such grants." *Ibid.*

Third, the City obligates MNN to adhere to the state-law requirement that it run noncommercial content without charge and on a "first-come, first-served" basis. N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(4). In particular, the CAO Agreement—which the City established in its franchise agreement with the cable operators—incorporates state law. It obligates MNN to "maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law." Am. Compl. ¶ 33 (quoting CAO Agreement § 3.3.01). See also Pet. App. 37a (quoting same).

Reflective of these state-law obligations, MNN has plainly stated its "mission": to "ensure the ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." Pet. App. 37a.

Fourth, the City uses its coercive power over cable franchisees to provide for MNN's funding. As part of the franchise agreements, the City obligates cable franchisees to make multi-million dollar annual payments to MNN. See, *e.g.*, Franchise Agreement § 8.3; CAO Agreement §§ 2.1 & 2.2.

Fifth, pursuant to MNN's bylaws, the City retains partial control of MNN. Pet. App. 37a. The Manhattan Borough President selects two of MNN's directors. *Ibid*. The President additionally serves as a non-voting, *ex officio* member of MNN's board. See *MNN Staff*, Manhattan Neighborhood Network, perma.cc/A2VX-7QUF.

C. Factual background.

Respondents DeeDee Halleck and Jesus Papoleto Melendez produced video content that they aired on MNN's public access stations. Pet. App. 34a.

In December 2011, Halleck was denied entry to an MNN board meeting. Pet. App. 38a. In March 2012, respondent Melendez attended an MNN board meeting at the invitation of petitioner Coughlin, MNN's executive director. *Ibid*. Respondent Halleck came as well and began videotaping the meeting; as a result, MNN employee Iris Morales called Melendez "a traitor." *Ibid*. Later in March 2012, "Morales screamed at [respondent Melendez], threw papers and lightly struck him." *Ibid*.

In July 2012, petitioners hosted "an event to mark the opening of the El Barrio Firehouse Community Media Center." Pet. App. 5a. This was "an invitation-only formal ceremony * * * attended by many New York City politicians." *Id*. at 38a. Respondents, despite being active contributors to MNN, were not invited. *Ibid*.

Respondents stood outside the event, interviewing attendees. Pet. App. 5a-6a. Respondents attempted to interview Joseph Figueroa, Morales' boyfriend. *Id*. at 39a. After Figueroa and respondent Melendez exchanged words, Figueroa "rushed at" Melendez, attempting to strike him. *Ibid*. "An MNN

security guard intervened, grabbing Mr. Figueroa before he could strike [respondent] Melendez." Am. Compl. ¶ 79. Security nonetheless allowed Figueroa to attend the El Barrio event, while continuing to deny respondents access. *Id.* ¶ 80.

In reaction to this incident, Melendez made an on-camera comment regarding race and class:

> You know what's funny? I got to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facility here. Because I am being locked out by people of color. There's irony for you.

Pet. App. 39a.

Respondents ultimately produced a video, "The 1% Visits the Barrio," that included this footage. Pet. App. 5a-6a. The film was critical of petitioner MNN, "present[ing] MNN as an organization more interested in pleasing 'the 1%' than the East Harlem community." *Id.* at 39a. Respondent Melendez denounced MNN for refusing him entry to the ceremony while it embraced well-connected city politicians. *Id.* at 38a-39a.

After initially running it, MNN later permanently banned the video from its networks. Pet. App. 6a-7a, 40a. And it suspended respondents from submitting *any* programming for airing: Halleck, for a year; and Melendez, forever. *Id.* at 40a.

The parties disagree about why. Petitioners now claim that the video was "intended to incite violence and harass[] staff." Pet. App. 40a. Respondents allege that MNN's purported justifications are pretexts for its real motive—disapproval of their video's substantive message. *Id.* at 6a-7a; Am. Compl. ¶¶ 91-92, 105-108, 110.

D. Proceedings below.

Respondents sued petitioners, asserting that petitioners violated their First Amendment by retaliating against them because of their viewpoint. Pet. App. 34a-35a.[4]

1. Recognizing the issue a "close call," the district court granted petitioners' motion to dismiss. Pet. App. 34a-53a. The court agreed that "the regulation of free speech in a public forum is 'a traditional and exclusive public function.'" *Id.* at 45a-46a. "Thus, if [respondents] have plausibly pled that MNN's administration of public access channels constitutes the administration of public fora, then they have plausibly pled that MNN was a 'state actor' under the public function test." *Id.* at 46a.

The district court, however, concluded that MNN's public access channels are not public forums. Pet. App. 46a-53a. It reasoned that "MNN is a private company that operates television channels, and the ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." *Id.* at 51a (quotation and alteration omitted).

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[4] They also sued New York City. The district court dismissed those claims (Pet. App. 43a-44a), and the court of appeals affirmed (*id.* at 17a-18a).

2. The court of appeals reversed. Pet. App. 2a-18a. Considering the particular "statutory, regulatory, and contractual framework under which this cases arises," the court concluded that the channels operated by MNN are public forums. *Id.* at 13a. Given New York's legal regime, "[a] public access channel is the electronic version of the public square." *Ibid.*

The court expressly noted that it was not "determining whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square." Pet. App. 13a. Rather, it tied its conclusion to the specifics of the state regulations that require first-come, first-served access, the law that restricts the ability of channels to regulate the station content, the City's designation of MNN as the channel administrator, and the contractual provisions obligating MNN to adhere to state law. *Id.* at 4a, 13a-14a & n.7.

Because the channels are public forums, the court concluded that, in designating petitioner MNN as the regulator, the City delegated a public function to MNN. Pet. App. 14a-15a. The connection between the City and MNN "is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels." *Ibid.* Thus, a "senior municipal official" has conferred on MNN and its employees "the authority to administer" a public forum. *Id.* at 15a.

Judge Lohier concurred. Pet. App. 19a-21a. He underscored the "the specific circumstances of this case" render "the public function test" appropriate. *Id.* at 19a. He understood the majority opinion as holding that New York City delegated to MNN the public function of administering and regulating speech in a public forum. *Id.* at 21a. Indeed, the pub-

lic access channels run programming relating "to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy." *Id.* at 20a.

Judge Jacobs concurred in part and dissented in part. Pet. App. 22a-33a. He would have concluded that MNN's channels are "entertainment facilit[ies]," not public forums. *Id.* at 25a. Since "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the state," he would have found that MNN was not a state actor. *Ibid.* Judge Jacobs did not address the requirement imposed by New York State and the City obligating MNN to air content on a "first-come, first-served" basis. See *id.* at 22a-33a.

REASONS FOR DENYING THE PETITION

Review is unwarranted: this case does not implicate the questions presented by the petition; the decision below is correct; there is no conflict among the circuits; and the lower court's decision has little practical consequence.

A. The court of appeals did not adopt a "*per se*" rule.

The petition rests on the premise that the court of appeals adopted "a *per se* rule that private operators of public access channels are state actors subject to constitutional liability." Pet i. The court of appeals, petitioners maintain, held that "public access channels are always public fora." *Id.* at 18. This sup-

posed holding is the basis of both questions presented. *Id.* at i.[5]

Petitioners are incorrect. The court of appeals did not reach that conclusion—and its holding certainly does not depend on it. In fact, the court explicitly identified that it was *not* establishing a blanket rule regarding public access channels; it did not "determin[e] whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square." Pet. App. 13a. Rather, the court twice underscored that its decision was tethered to "the statutory, regulatory, and contractual framework under which this case arises." *Ibid.* See also *id.* at 13a-14a (evaluating state and municipal law and the relevant contract). And, in so concluding, the court tied its holding to "the municipal authority given to MNN in this case" and "the circumstances of this case." *Id.* at 17a.

There are several unique "statutory, regulatory, and contractual" provisions that create the relevant "framework" in New York City. Pet. App. 13a. These include:

- **First-come, first-served access:** New York law requires a public access channel to serve the public on a "first-come, first-served" basis. Pet. App. 4a.

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[5] The second question also rests on the factual assertion that New York "has no control over" petitioner MNN's "board or operations." Pet. i. But this is obviously false: as petitioners partially acknowledge (Pet. 4), the Manhattan Borough President sits on MNN's board of directors and also chooses two other directors. Pet. App. 37a; *MNN Staff*, Manhattan Neighborhood Network. Local government thus does have some direct control over MNN.

- **Free air time:** New York law provides that "[c]hannel time for [public] access programming shall be without charge to the user." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(6).
- **Noncommercial material:** New York law restricts the public access channel to noncommercial material. Pet. App. 4a.
- **A "must carry" obligation that is coextensive with the First Amendment:** New York State law obligates cable franchisees to carry public access network content *unless* the material is not protected by the First Amendment. *Id*. at 14a n.7.
- **Public reporting:** New York law requires that public access networks, including petitioner MNN, maintain publicly accessible records regarding the identities of individuals requesting airtime. N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(10).
- **Mandatory creation:** New York law *obligates* municipalities, when awarding cable franchises to operators with more than 36 channels, to create a public access station. *Id.* § 895.4(b)(1).
- **Coercive funding:** The City funds petitioner MNN—albeit indirectly—by obligating cable companies to make extensive, multimillion dollar annual payments. See Franchise Agreement § 8.3; CAO Agreement §§ 2.1 & 2.2.
- **Board control:** The City appoints two of MNN's directors, and the Manhattan Bor-

ough President has a permanent, *ex officio* seat on the board. Pet. App. 37a; *MNN Staff*, Manhattan Neighborhood Network.

- **Contract negotiation:** The City—in its cable franchise agreement—negotiated and controlled the terms of MNN's relationship with cable operators. Via that contract, the City obligates MNN to adhere to all state and local laws regarding its operations—including the public access requirement. Pet. App. 37a; Franchise Agreement § 8.1.8 & Appendix C.

The court of appeals' consideration of this "framework" (Pet. App. 13a) reflects the precise sort of context-based consideration required by the state-actor analysis. See Pet. 19-21. Taken together, these features compel the conclusion that New York City has chosen to designate its public access stations as public forums. See pp. 22-25, *infra*.

Most local governments, however, have materially different laws. Petitioners do not attempt to demonstrate that other jurisdictions replicate—much less approximate—New York's laws. The decision below, therefore, has no bearing elsewhere.

It appears that the vast majority of states lack any obligation analogous to New York's "first-come, first-served" law. See, *e.g.*, Ariz. Rev. Stat. Ann. § 9-506(D)(1); Cal. Pub. Util. Code § 5870; Conn. Agencies Regs. § 16-331a-2; Fla. Stat. Ann. § 610.109; Idaho Code Ann. § 50-3010; Ind. Code Ann. § 8-1-34-25; Iowa Code Ann. § 477A.6; Kan. Stat. Ann. § 12-2023; La. Stat. Ann. § 45:1369; Me. Rev. St. Ann. tit. 30-A, § 3010; Mo. Ann. Stat. § 67.2703; Nev. Rev. Stat. § 67.711.810; N.H. Rev. Stat. Ann. § 53-C:3-a;

N.J. Admin. Code § 14:18-14:4; N.C. Gen. Stat. Ann. § 66-357; Ohio Rev. Code Ann. § 1332.30; Okla. Stat. Ann. tit. 11, § 22-107.1; Tenn. Code Ann. § 7-59-309(a); Tex. Util. Code Ann. § 66.009; Vt. Stat. Ann. tit. 30, § 504; Va. Code Ann. § 15.2-2108.22; W. Va. Code Ann. § 24D-1-9. Minnesota expressly authorizes municipalities to determine for themselves whether public access channels must be "available for use by the general public on a first-come, first-served, nondiscriminatory basis." Minn. Stat. Ann. § 238.084. The only other state of which we are aware to have a first-come, first-served law is Rhode Island. See 815 RICR § 10-05-1.14.1.

The substantial majority of state laws thus allow local governments to structure public access channels in a way that does not designate them public forums. Governments may choose to adopt a policy that imposes substantive or editorial controls, rather than committing to air all content on a first-come, first-served basis.

A local government may, for example, restrict public access channels to only those topics with special relevance to the community. Tennessee has done so statewide: it limits public access channels to "local interest programming that may include meetings of local governing bodies, boards and commissions, community events, community sporting events," and other content defined by regional interest. Tenn. Code Ann. § 7-59-309(a)(3).

Alternatively, a government may (either itself or via a nonprofit administrator) curate content. In this way, it may treat a public access channel like a museum, public theater, or public broadcaster, airing only select content.

The Los Angeles public access station has elected to do just that. Like most states, California lacks a statewide first-come, first-served law. See Cal. Pub. Util. Code § 5870.[6] That has consequences: the Los Angeles Cable Television Access Corporation airs only "the 'Best Of' Public Access programming in the City of Los Angeles." *Public Access Guidelines*, L.A. Cable Access Corp., perma.cc/JE7W-P87H. An "advisory committee" selects the content deemed "Best Of" on "a quarterly basis." *Ibid.* Only after content is selected as "Best Of" will it then run on a "First-come, First-serve basis." *Ibid.*[7]

Creative Tucson—the Tucson public access channel—combines regional preference and curation. Like California, there is no first-come, first-served

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[6] The current structure of the Los Angeles Cable Television Access Corporation stems from California's 2006 Digital Infrastructure and Video Competition Act. See Cal. Pub. Util. Code § 5800 *et seq.* Previously, California franchise agreements often included a first-come, first-served policy. As the Los Angeles station confirms, those old policies have now been replaced. These local decisions matter.

[7] Chicago—and the Chicago Access Corporation (CAC)—also has no first-come, first-served policy. CAC may allocate channel time and space on Chicago's public access channels "on a reasonable, nondiscriminatory basis." CAC Am. Br. 18 (citing Chi., Ill. Mun. Code ch. 4-280, art. VII, § 370(1)). This, in CAC's view, affords it "significant editorial discretion" in scheduling public access programs. CAC Am. Br. 18.

Amicus Chicago Access Corporation further highlights that, unlike petitioner MNN, "[n]one of the members of its Board of Directors is appointed or controlled by any government official." CAC Am. Br. 15. But here, the Manhattan Borough President has a permanent seat on MNN's Board, and the President selects two more board members. *MNN Staff*, Manhattan Neighborhood Network.

rule in Arizona. See Ariz. Rev. Stat. Ann. § 9-506(D)(1). Tuscon's Member Manual provides that "[p]rograms of local interest will have priority over other programs." *Member Manual*, Creative Tucson, goo.gl/eFgprm. And Creative Tucson curates: "Member content is considered for broadcast on our cable channel if it meets the standards of the Creative Tucson staff and Advisory Board, which are comprised of artists and media professionals." *Ibid.* Thus, while "Creative Tucson is committed to giving each program and producer an equal and fair opportunity to showcase and participate," it will use its editorial prerogative "to provid[e] high quality, locally made programming." *Ibid.*

New York's law requiring statewide first-come, first-served access is the rare exception, not the norm. Yet this is perhaps the most critical factor supporting the conclusion that New York has designated its public access channels as public forums. As we will elaborate, New York has structured its public access channels as "generally available to a certain class of speakers"; most other local governments, however, "reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 679 (1998) (citation omitted). For purposes of the public-forum analysis, this distinction is essential.

There are other differences, too. Many other states do not obligate their public access channels to provide free access. As a result, some channels charge fees. The Houston Media Source, for example, charges to air content; an adult Houston resident must pay $225 a year for channel privileges. See

Producer Information, Houston Media Source, goo.gl /yufVkz. To air programs on Creative Tucson, an individual must become a member at a cost of $5 per month. See *Membership*, Creative Tucson, goo.gl /yaiafS.

These are just some of the different ways in which public access channels are configured. Petitioners do not disagree. They recognize that "public access channels have historically been run in various configurations and, most importantly, by a diverse set of operators." Pet. 21.

Differences in local law ultimately drive different results. New York's decision to designate a digital public forum—and the resulting decision below—says nothing at all about the treatment of public access channels in other regions, where states and municipalities have made different choices. Indeed, the Los Angeles and Tucson stations are likely not public forums. Those conclusions would be entirely consistent with the decision below.

This case does not, therefore, implicate the questions for which petitioners seek review. The actual issue is the fact-bound question of whether New York has chosen to designate its public access channels as public forums, rendering administration of those channels a public function. Review of this case would establish a rule good for New York only.

B. The decision below is correct.

Review is additionally unwarranted because the decision below is correct. Administering a public forum is a public function; petitioners do not appear to disagree. And, as we have begun to explain, New York City has purposefully designated its public access stations as public forums.

1. Administering public forums is a public function.

Petitioners do not appear to dispute that regulation of a public forum is a public function. See Pet. 15-17. Indeed, this issue is long settled.

A state actor has "very limited" authority "to restrict speech" in places that are public forums. *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2529 (2014). It typically may not impose viewpoint-based regulations, but it may enforce reasonable time, place, and manner restrictions. See *ibid*.

These crucial First Amendment protections do not dissipate when a municipality delegates regulation of the public forum to a nominally private actor. A city cannot circumvent its citizens' free-speech rights by contracting out administration of a public park or sidewalk to a private security force.

In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), the Court examined whether a company that regulated speech in a shopping district in its privately owned town became a state actor. The company, the Court held, was performing a public function: the "public * * * ha[d] an identical interest in the functioning of the community [so] that the channels of communication remain free." *Id.* at 506-507. See also *Evans*, 382 U.S. at 302 ("[T]he public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.").

The lower courts uniformly understand *Marsh* to compel the conclusion that regulation of a public forum is a quintessential public function. See, *e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011)

("Regulating access to and controlling behavior on public streets and property is a classic government function."); *United Church of Christ* v. *Gateway Econ. Dev. Corp. of Greater Cleveland*, 383 F.3d 449, 455 (6th Cir. 2004) (noting that the operation of a "public forum * * * serves as a public function"); *Lee* v. *Katz*, 276 F.3d 550, 556-557 (9th Cir. 2002) ("[T]he regulation of free speech within public forum" is "quintessentially an exclusive and traditional public function.").

The district court below agreed that "the regulation of free speech in a public forum is 'a traditional and exclusive public function.'" Pet. App. 45a-46a. And the court of appeals followed this well-established law, reasoning that "facilities or locations deemed to be public forums are usually operated by governments." *Id.* at 14a-15a. As the concurrence underscored, this was a public-function analysis. See *id.* at 21a.

2. New York has chosen to designate its public access channels as public forums.

The court of appeals correctly concluded that—in light of the decisions made by state and local government—Manhattan's public access channels are public forums.

a. Public forums come in two principal flavors: traditional and designated. *Perry Educ. Ass'n*, 460 U.S. at 45-46.[8] As to the latter, the state designates a

[8] As we have noted, the petition centers on whether public access channels are "*per se*" public forums. Whether something qualifies as a "traditional public forum" may well be a question susceptible to uniform adjudication. See, *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 456 (2011) ("[W]e have repeatedly referred to public streets as the archetype of a traditional public forum."). But

place "a public forum" when it "'intentionally open[s] a nontraditional forum for public discourse.'" *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 680 (1992) (quoting *Cornelius*, 473 U.S. at 802).

A designated public forum is entitled to the same constitutional protections as a traditional one. That is, "[t]he Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Perry Educ. Ass'n*, 460 U.S. at 45. See also *Minnesota Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1885 (2018); *Krishna Consciousness*, 505 U.S. at 678 (Once a government has "opened" a place "for expressive activity by part or all of the public," "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum.").

"[T]o ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public forum," the Court evaluates "the policy and practice of the government," as well as "the nature of the property and its compatibility with expressive activity." *Cornelius,* 473 U.S. at 802. See also *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015). Against this backdrop, New York City has undoubtedly designated its public access channels as public forums.

First, New York City requires that its public access channels be "'generally available' to a class of speakers." *Arkansas Educ. Television*, 523 U.S. at

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whether a government has designated a particular place a public forum is necessarily a context-specific question.

679 (quoting *Widmar* v. *Vincent,* 454 U.S. 263, 264 (1981)). State and local law compel petitioner MNN to provide free airtime for noncommercial content to *all* individuals on a "first-come, first-served" basis. Pet. App. 4a.

Petitioners cannot assert editorial control over the content aired. This is the calling card of a public forum. The Court has underscored the critical "distinction between 'general access,' which indicates the property is a designated public forum, and 'selective access,' which indicates the property is a nonpublic forum." *Arkansas Educ. Television*, 523 U.S. at 679 (citations omitted). New York's public access channels are, by operation of state law, "general access."

But, when local governments make different choices, public access channels are "selective access." In those jurisdictions, channel administrators may make "individual, non-ministerial judgments as to which of the eligible" content airs. *Arkansas Educ. Television*, 523 U.S. at 680. Not so in New York.

Second, city and state law mandate that among the "purposes" of the public access channel is "the designation of a forum" for expressive activity. *Krishna Consciousness*, 505 U.S. at 683. As Judge Lohier explained, petitioner MNN's "programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy." Pet. App. 20a. Indeed, MNN's "mission" is to "ensure the ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." *Id.* at 37a.

Third, "the nature of the property and its compatibility with expressive activity" can further support the conclusion that the government has desig-

nated a place as a public forum. *Cornelius*, 473 U.S. at 802. See also *Widmar*, 454 U.S. at 267 n.5 (observing that a university campus "possesses many of the characteristics of a [traditional] public forum"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (noting that the theater was "designed for * * * expressi[on]"). A public access station is no doubt compatible with expressive activity.

Fourth, New York City *created* the public access channels: New York State obligates municipalities to compel the creation of public access channels, and New York City fulfilled that obligation in the requirements it has imposed on cable franchisees in New York. See pp. 5-9, *supra*. This is the antithesis of government "inaction." *Krishna Consciousness*, 505 U.S. at 680.

This conduct, taken together, evinces New York City's unmistakable intent to designate its public access channels as public forums. While local governments are under no federal obligation to make this decision, New York City has chosen to do so.

b. There is no reason to reach a different conclusion based on some theory relating to private property. Petitioners have developed no such argument, and therefore they have waived any such contention now. In any event, it is not an issue that warrants review.

First, whatever one might think of the various opinions in *Denver Area*, the issue that generated disagreement there is not implicated here.

Denver Area concerned the constitutionality of Section 10(c), which authorized cable companies to decline to run content from public access channels. *Denver Area Educ. Telecomms. Consortium, Inc.* v.

FCC, 518 U.S. 727, 735 (1996) (plurality). *Denver Area* was thus a case about the property interest a cable company has in its *cable distribution system*. Justice Thomas in dissent focused on his view that "[c]able systems are not public property." *Denver Area*, 518 U.S. at 827 (Thomas, J., concurring in the judgment in part and dissenting in part).

But this case is not about a cable distribution system. No cable company is party to this dispute, and there is no contention that any cable company is a state actor. The issues that motivated disagreement in *Denver Area* are not present here.

Moreover, because *Denver Area* addressed a facial challenge to Section 10(c), the opinions approach the cable system as a whole, considering public access and leased access channels in broad strokes. As we have explained, that sort of analysis is misplaced here, where the fact-bound state-actor inquiry requires nuanced appreciation of the particular framework at issue. This case does not turn on any broad pronouncement of law.

Second, the interest actually at issue here—the management of the content on Manhattan's public access channels—is not "private," and may not even be "property."

Petitioners have not attempted to show that whatever interest is implicated is a "private" one. A public access channel exists solely if a state or municipal government chooses to create it. See 47 U.S.C. § 531. If a local government elects to do so, it then determines who (the government, a nonprofit, or the cable operator) will operate the channel. See Pet. 21.

State and local governments control every aspect of a public access channel: they can create it, destroy it, operate the channel itself, or delegate its management to some third party on terms that the municipality dictates. There is hardly anything "private" about this interest.

Not only that, but when New York City created the public access channel via its cable franchises, it rendered that channel a public forum. Only after so designating the channel did the City delegate its administration to petitioner MNN. Even if that delegation can be thought to have effected a property transfer—a dubious proposition—any property interest was accompanied by the plain condition that the public access channels in New York City are public forums. The City has therefore never converted any private property to a public forum.

Nor do petitioners show how there is a "property" interest at stake here. Public access channels are likely a "government program[]," which can also be a designated public forum. *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). See also *id*. at 478 (describing a "government program"). This is a more accurate way to describe the operation of the relevant laws.

Third, even if public access channels could be thought of as private property, that does not preclude the City from designating them a public forum. In *Cornelius*, the Court held that "private property dedicated to public use" *can* be a public forum. 473 U.S. at 801. See also *Marsh*, 326 U.S. at 505-506; *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public

and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). This Court's precedents are thus incompatible with any suggestion that private property can *never* take on the attributes of a public forum.

And there obviously can be no such blanket rule: suppose, for example, a government leases private property and officially designates it a public forum. Having done so, the municipality cannot rest on the nominally private ownership of the property as a basis to resist application of the First Amendment. Moreover, "in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands." *Denver Area*, 518 U.S. at 792 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Here, New York City asserts complete domination over the public access channels—it creates them, it funds them, it decides who operates them, and it establishes the terms governing their administration. This is far more extreme an interest than a mere lease of property.

At bottom, there is no basis to conclude that the City is incapable of designating its public access channels as public forums.

C. There is no circuit conflict.

Once petitioners' caricature of the decision below is set aside, the claim of a conflict among the circuits unravels.

1. The decision below does not conflict with *Wilcher* v. *City of Akron*, 498 F.3d 516 (6th Cir. 2007).

In *Wilcher*, the court addressed whether public access stations are "a traditional service of local government." 498 F.3d at 519. This is the test for a "traditional public forum." See *Perry Educ. Ass'n*, 460 U.S. at 45-46. Providing public access television is not, the court of appeals concluded, "a function traditionally reserved to the state." *Wilcher*, 498 F.3d at 519.

The conclusion that a public access station is not a traditional public forum does not conflict with our argument or the holding below. As we have explained, petitioner MNN operates a public forum because New York City has designated it as such—not because *all* public access channels qualify. *Wilcher* did not consider whether the public access channel there was a *designated* public forum; the court specifically disclaimed addressing whether "the public access channel" is a public forum by means of "government fiat." 498 F.3d at 522 (quotation omitted).

Nor could *Wilcher* create a conflict, as the public access station there had none of the hallmarks of a designated public forum:

- **No first-come, first-served obligation:** Neither Akron nor Ohio imposed an open-access requirement, precluding editorial control.[9]

[9] The underlying documents filed in *Wilcher* confirm that there was no first-come, first-served policy. See Dkt. 12-1, at 18-19, 5:05-cv-00866 (N.D. Ohio); Dkt. 12-2, at 3-4; Dkt. 12-5.

- **No free access obligation:** Akron permitted the operator to charge a fee for airing videos. 498 F.3d at 518.
- **Operated by cable company:** Rather than the municipality delegating operation of the public access channel to a specialized nonprofit, the cable company (Time Warner) operated the channel. *Ibid.*

Against that backdrop, there was no showing that Akron rendered its public access channel "generally available to a certain class of speakers." *Arkansas Educ. Television*, 523 U.S. at 679.

In fact, Akron expressly allowed Time Warner to establish criteria for access to the network; it could propose and implement its own regulations. *Wilcher*, 498 F.3d at 518. Rather than allow the public free, non-discriminatory, first-come, first-served access to the network, Time Warner could and did establish policies to limit its use. *Ibid.*

Wilcher merely rejects the contention that operating a public access channel is *always* a public function. 498 F.3d at 519-522. We do not disagree: different local decisions drive different results.

2. Nor does *Alliance for Community Media* v. *FCC*, 56 F.3d 105 (D.C. Cir. 1995) (*ACM*), create a conflict warranting review.

To begin with, this Court reversed *ACM* in *Denver Area*, 518 U.S. at 766. So *ACM* has no force in view of this Court's subsequent decision. Indeed, the D.C. Circuit has never relied substantively on *ACM*.

Nor does the holding below conflict with the reasoning of *ACM*. That case was not a lawsuit against a public access channel; it considered the role of the

cable franchisee in displaying content on its system. And, while *ACM* suggested that there was no state action at issue (56 F.3d at 112-115), this Court disagreed. *Denver Area*, 518 U.S. at 737 (plurality). Even petitioners' *amicus* admits that "[s]tate action indisputably was at issue." Cato Am. Br. 5.

Moreover, *ACM*'s discussion of whether public access channels are "public forums" considered whether they are like those places "traditionally used for public expression—streets and parks, for instance." 56 F.3d at 121-123. The court reasoned that not all public access channels qualify as public forums by the virtue of federal law.

Like *Wilcher*, that conclusion does not address the specific issue here. *ACM* did not have before it—and thus did not consider—the particulars of *any* local law establishing a public access channel. It certainly did not decide whether a municipality may, in circumstances like those here, *designate* a public access channel as a public forum.[10]

Nor is there any conflict with the unpublished, per curiam decision in *Glendora* v. *Sellers*, 2003 WL 22890043 (D.C. Cir. 2003). That opinion includes no analysis whatever, much less any reasoned holding in conflict with the decision below.[11]

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[10] Petitioners also cite a handful of district court cases. See Pet. 29-30. A conflict with a district court decision does not warrant this Court's review; if anything, it indicates the need for percolation. But there is no conflict: petitioners have not identified a single district court to have addressed a legal framework materially similar to that here yet nonetheless held that the administration of a public access channel is not a public function.

[11] Since operating a public forum is the public function establishing state action here, this case does not conflict with *Loce* v.

D. Petitioners misstate the implications of the holding below.

Petitioners and their *amici* offer a familiar parade of horribles that they suggest will result from the decision below. See Pet. 30-34. Two common errors pervade these claims.

First, as we have already explained, petitioners are wrong to assert that the court of appeals established a *per se* rule that governs all public access stations. See pp. 13-20, *supra*. Petitioners' analysis conflates the "traditional public forum" analysis (which often does establish bright-line rules) with the "designated public forum" doctrine (which does not). Because the decision below is specific to the particular "framework" (Pet. App. 13a) that governs New York City, it has no implications for localities that have made different choices.

Second, petitioners lose sight of the fundamental principle that only the *government* may designate a non-traditional place as a public forum. That is, for "a place not traditionally open to assembly and debate," it is a "public forum" only if "a government intended to designate" it as such. *Walker*, 135 S. Ct. at 2250 (quotation and alteration omitted). See also *Arkansas Educ. Television*, 523 U.S. at 677 ("Designated public fora * * * are created by purposeful governmental action."). A place cannot be designated a public forum absent intentional *government* action.

Time Warner Entertainment Advance/NewHouse Partnership, 191 F.3d 256 (2d Cir. 1999). *Loce* concerned "leased access" channels, which a cable operator reserves "for commercial use by unaffiliated programmers." *Id.* at 259. Those channels are not public forums, as they are not available for free public use. *Loce*'s finding of no state action is thus entirely consistent with this case; there is no "indefensible distinction." Cato Am. Br. 7.

This is why "the quad of a private college" (Pet. 17) is not a public forum.

1. Petitioners assert that the decision below imposes burdens on public access channels. Pet. 31-32. But petitioners do not—and cannot—substantiate the implicit premise that unjustified litigation arises with any frequency. As the lack of any circuit split or recurrence of the issue in the courts of appeals confirms, litigation of these issues is infrequent.

In any event, the mere prospect of a frivolous lawsuit is no reason to foreclose core constitutional rights. The canard of unjustified settlement pressure is present in virtually every form of civil litigation. But district courts are well equipped to expeditiously resolve frivolous cases—they do so every day. Petitioners merely express the preference shared by any defendant—they would simply prefer not to have to answer for their conduct in court. Petitioners' invocation of attorneys' fees (Pet. 31) is especially surprising, as fee-shifting is available only to a prevailing party.

Application of the First Amendment to petitioner MNN has no substantial effect on its day-to-day operations. A reasonable, viewpoint-neutral rule is allowed as a valid time, manner, and place restriction. See *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 323 (2002) ("Regulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties but are one of the means of safeguarding the good order upon which civil liberties ultimately depend." (quotation and alterations omitted)). Nothing will preclude petitioner MNN from scheduling its programming or adopting any other viewpoint-neutral rule.

The decision below has just one material effect: it precludes petitioner MNN from silencing speech with which it substantively disagrees.

The decision below does not affect networks' liability for other functions, like "provid[ing] technical training." CAC Am. Br. 19. "[A]n entity may be a State actor for some purposes but not for others." *Caviness* v. *Horizon Cmty. Learning Ctr., Inc.,* 590 F.3d 806, 813 (9th Cir. 2010). Petitioner MNN is a state actor when it selects which programs are aired because it is then administering a public forum. It is not a state actor in other circumstances. For this reason, the decision below does not render petitioner MNN subject to any broad "collateral consequences." Pet. 32.

That said, one aspect of petitioners' argument is bizarre. Petitioners feign horror at the notion that MNN could be subject to "state sunshine" laws. Pet. 32. But petitioner MNN *is*—clearly and expressly—subject to a "state sunshine" law. Per New York law, petitioner MNN "*shall* maintain a record of the use of [its] channel[s]"; this record must "include the names and addresses of all persons using or requesting the use of [its] channel[s]"; and this "record shall be available for public inspection for a minimum of two years." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(10) (emphasis added).

New York plainly obligates petitioner MNN to make its records relating to First Amendment activities available to the public. Petitioners' argument relating to "state sunshine" laws simply underscores that this sort of obligation fits hand-in-glove with a determination by the local government that these public access channels are public forums.

2. The decision below has no effect on whether other kinds of media qualify as public forums. See Pet. 32-34.

Social media is nothing like petitioner MNN. The government did not create social media services like Twitter. The government does not impose first-come, first-served access rules on Twitter, mandate that it be free of charge, or preclude Twitter from exercising editorial control. The government certainly has not designated Twitter a public forum. The decision below thus does not compel any conclusions about the application of the First Amendment to social media.[12]

As to public radio stations, petitioners again do not show that governments have *designated* them as public forums. Indeed, petitioners identify no state or local laws that mandate free, first-come, first-served access to public radio stations.

Finally, the decision below has no relevance to Internet service providers. See Cato Am. Br. 15-16. That is because, as *amicus* admits, "Congress[] [has] recogn[ized] that Internet service providers and other online platforms should be able to provide content or restrict access to certain materials." *Id.* at 16 (cit-

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[12] In *Knight First Amendment Institute at Columbia University* v. *Trump*, 302 F. Supp. 3d 541, 568 (S.D.N.Y. 2018), the district court cited the decision below exactly once—for the generic conclusion, unchallenged by petitioners here, that regulating a public forum is a public function. That *Knight* did *not* consider the decision below in exploring the contours of the First Amendment's applicability to Twitter merely underscores how the considerations at issue here are differently entirely. And this case, based on this fact-specific record, is not an appropriate vehicle for shadow adjudication of unrelated litigation.

ing 47 U.S.C. § 230(c)). Precisely. The government has not designed Internet service providers as public forums.

In any event, if this case ever does prompt a subsequent court of appeals to reach the sort of fanciful results that petitioners and their *amici* fear—such as deeming Twitter, NPR, or an Internet service provider a state actor—the Court can grant review then. These fairy-tale monsters are no reason for review here.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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