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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents attempt to change the subject and hide a clear and irreconcilable circuit split by mischaracterizing the Second Circuit's decision in this case *and* the decisions in the other Circuit courts. Respondents argue that the Second Circuit was correct to ignore this Court's state action tests and instead look at the forum—in this case, public access television—to determine whether it looks like a *constitutional* public forum. If it does, according to the Respondents, then its private operators are, *de facto*, part of the government. This approach is directly at odds with this Court's state action jurisprudence and with the other circuits that have considered the issue.

Moreover, Respondents seek to minimize the circuit split by manufacturing distinctions that they argue limit the holding of this case to New York's public access regime. But those differences are inaccurate, irrelevant, and most importantly, did not appear anywhere in the Second Circuit's analysis. The Second Circuit's analysis is much broader than public access channels in Manhattan, and its implications are so dangerous precisely because the decision below sweeps broadly and will apply in areas outside of the public access television context. The Second Circuit's decision will reshape all state action litigation in the Second Circuit in a way that departs dramatically from this Court's guidance and from the decisions in other Circuits.

The central issue in this case—whether the private operator of a public access channel is a state actor—is of critical importance. There is confusion and uncertainty in the lower courts in the public access television and other

new media contexts, and this Court should grant certiorari to resolve this issue and give guidance to the lower courts.

I. REVIEW IS ESSENTIAL BECAUSE THERE IS A CLEAR SPLIT OF AUTHORITY ON A FUNDAMENTAL AND CRITICAL QUESTION

All three opinions below—the Majority, the concurrence, and the dissent—recognize that the Second Circuit created a clear circuit split in this case.[1] Respondents are on their own in arguing that the circuit split does not exist. To do so, Respondents contort the decision below beyond recognition and misread the decisions in the Sixth and D.C Circuits. They also dismiss out of hand the raft of district court decisions that amplify the circuit split.

A. Respondents Completely Distort the Decision Below

The Second Circuit held that a private party was a state actor without meaningfully engaging in *any* recognizable state action analysis—despite this Court's mandate that "careful adherence to the 'state action' requirement … preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

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1. Pet. App. 16a-17a (majority opinion); 19a (concurring opinion); 28a-31a (dissenting opinion). References to "Pet." and "Pet. App." are to Petitioner's Petition for a Writ of Certiorari, filed June 21, 2018, and its Appendices. "Opp." refers to Respondents' Brief in Opposition.

The Second Circuit skipped all of this Court's established state action tests and ignored its own prior cases where it applied those tests. Despite decades of precedent requiring it to do so, the Second Circuit ignored MNN's status as a private company, and looked solely at the *nature* of public access television. Taking its cue from Justice Kennedy's partial dissent in *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996), the Circuit then held that Manhattan's public access channels are *constitutional* public fora, and, relying on that finding, held that MNN is a state actor because any operator of a *constitutional* public forum is, *by definition*, a state actor. This conclusion—*and this analysis*—are in direct conflict with the Sixth and D.C. Circuits. The cart-before-the-horse approach to the state action question conflicts with this Court and with sister circuits around the country.

Respondents attempt to bolster the Second Circuit's misplaced tautological argument by pointing to multiple factors that the courts below never considered. They point to a list of nine criteria that they argue are "*unique*" to New York and that "compel the conclusion that New York City has chosen to designate its public access station as public forums." Opp. 14-16.[2] But these factors did not form the basis for the Second Circuit's holding, they are not unique to New York, and they do not compel a finding that a private party is a state actor.

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2. The factors are: "first-come, first-served access," "free air time," "noncommercial material," a "must-carry obligation that is coextensive with the First Amendment," "public reporting," "mandatory creation," "coercive funding," "board control," and "contract negotiation."

Several of these factors are simply co-extensive with the viewpoint- and content-neutrality required under the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521 et seq.) (the "Cable Act"), and recognized by this Court in *Denver Area*.[3] Justice Kennedy observed in *Denver Area* that public access channels are "available at low or no cost to members of the public, ***often on a first-come, first-served basis***." Pet. App. 4a (emphasis added). This is borne out in the Cable Act itself. *See* 47 U.S.C. § 531(e) (prohibiting cable operators from imposing any editorial control over public access channels, with an exception for obscenity). Several of Respondents' other factors are just wrong. For example, it is undisputed that there is *no* government "*board control*" over MNN, *i.e.*, the City can only nominate *two* of MNN's thirteen board members—by definition, not a controlling position.[4] Other factors that Respondents point to are completely irrelevant[5]

3. These are: (a) first-come, first-served access; (b) noncommercial material; and (c) the "must-carry obligation," meaning that the broadcaster need not air material not protected by the First Amendment, *e.g.*, obscene material.

4. The Manhattan Borough President holds an ex-officio, non-voting seat on MNN's Board. There is also no "coercive funding" as MNN receives its funding in separately negotiated agreements with the cable franchisees and other private sources—*not the City of New York*. The City provides neither capital nor operating support to MNN. Nor does it provide any facilities. Indeed, this lack of control by the City is confirmed by the Second Circuit's affirming the dismissal of the City from the case.

5. The suggestion that the City of New York coerces MNN to abide by state law is risible; MNN is required to abide by state law regardless of its contract with the cable franchisee. Respondents' reliance upon MNN's colloquial use of the phrase

and the rest are hardly exclusive to New York.[6] Many municipalities have statutory schemes requiring first-come, first-served or nondiscriminatory access and have reporting requirements; and states outside of New York certainly allow municipalities to designate entities to operate public access channels.[7] Not surprisingly, more than half of all states have statutes that require public access channels to be "noncommercial."

Respondents' argument fails for another reason. If Respondents are correct that these factors are dispositive—*i.e.*, that the City "created" and "controls" MNN—this would clearly require engaging in the analysis this Court set forth in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), which is used to determine whether a private entity created pursuant

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"First Amendment rights" is a red herring. Opp. 24. Viewpoint neutrality is a hallmark of all public access channels; MNN's use of the phrase refers to its commitment to allow public access users first-come, first-serve nondiscriminatory access to the channel.

6. Respondents' discussion of the Los Angeles public access network is incomplete. While Los Angeles does have a "Best Of" public access channel, it also has West Hollywood Public Access, which schedules its programming "on a first-come-first-serve basis." *See* Submitting and Airing Programming, City of West Hollywood https://www.weho.org/city-government/communications/public-access-television/submitting-and-airing-programming.

7. For example, Massachusetts has public access channels that are free of charge for use by the public and available on a first-come, first-served, nondiscriminatory basis. *See* Guidelines for Community Television & PEG Access Policies, Foxboro Cable Access, https://www.fcatv.org/policy/#What_is_FCA; Studio FAQ's, HCAM, http://www.hcam.tv/studio-faqs.

to a governmental designation is a state actor. But Respondents, like the Second Circuit, do not even address *Lebron*; had they done so, it would have been clear that MNN is not a state actor. Pet. 6, 16 n.2. Moreover, taking Respondents' argument to its logical conclusion would also mean that Time Warner or other cable companies, wherever they operate public access channels on their systems in New York, would also be state actors, subject to First Amendment claims.[8]

Moreover, Respondents' ad hoc method of finding "state action"—looking at the forum instead of the actor—is inefficient and will lead to massive confusion in cases involving private entities. Engaging in the established state action threshold tests is far more efficient and predictable than what Respondents propose: *i.e.*, examining the nebulous, individualized factors Respondents point to, and then working backwards.[9]

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8. The same statutory and regulatory scheme that gives rise to MNN allows the cable franchisee (Time Warner) to operate public access channels at the direction of the Manhattan Borough President. N.Y. Comp. Codes R. & Regs tit. 16, §895.4(c)(1). Given the factors Respondents find dispositive, there would be no difference in Respondents' analysis if the Borough President had designated Time Warner to operate the channels.

9. New York's creation of an administrative remedy to address claims arising out of the operation of public access channels further undermines Respondents' argument that New York intended to create a public forum to be redressed by constitutional law principles. *See Assoc. of Cable Access Producers v. Pub. Serv. Comm'n*, 1 A.D.3d 761, 764 (N.Y. App. Div. 2003) (citing PSC mechanism for complaints regarding public access).

In any event, the Second Circuit did not rely on any of the items on Respondents' laundry list. Instead, it very clearly tied its holding to four specific factors:

> [W]here, as here,
>
> [F]ederal law authorizes setting aside channels for public access to be "the electronic marketplace of ideas,"
>
> [S]tate regulation requires cable operators to provide at least one public access channel,
>
> [A] municipal contract requires a cable operator to provide four such channels, and
>
> [A] municipal official has designated a private corporation to run those channels,
>
> [then] those channels are public forums.

Pet. App. 13a-14a. And, as set forth in the Petition, these specific criteria—the ones the Second Circuit actually relied on—are hardly unique to New York. Pet. 19-20; *see also* Motion for Leave and Brief for *Amicus Curiae* Chicago Access Corporation in Support of Petitioners at 16-19 & n.3, *Manhattan Cmty. Access Corp. v. Halleck*, No. 17-1702 (U.S. July 25, 2018). That is why the Second Circuit's ruling amounts to a *per se* test, inconsistent with this Court's repeated caution against such categorical analysis. Pet. 18-22 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 725-26 (1961); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001)). No amount of misdirection can avoid that conclusion.

Respondents also make a half-hearted attempt to argue that the decision below actually found that MNN was a state actor under the "public function" test—despite the fact that it explicitly did not do so. Indeed, the concurrence merely suggested that "we might ***also*** rely upon the public function test." Pet. App. 19a (emphasis added). In any event, the public function test is not satisfied under the facts of this case. Pet. 11, 17. This Court has made clear that the stringent public function inquiry has "carefully confined bound[aries]" and applies only to functions traditionally ***and*** exclusively performed by the state. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 (1978). As Respondents' case law makes clear, this test is limited to ***specific*** functions that are traditionally performed by the government—like regulating sidewalks (*Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Sagardía De Jesús*, 634 F.3d 3, 10 (1st Cir. 2011) and *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 455 (6th Cir. 2004)) and running a town (*Marsh v. Alabama*, 326 U.S. 501 (1946)).[10] Respondents cannot dispute the fact that the operation of a public access channel is not traditionally and exclusively a function of government. As the dissent below noted, "it is fortunate for our liberty that it is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." Pet. App. 26a.

10. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), concerns the constitutionality of Massachusetts legislation. It directly involves government action and does not implicate the state action inquiry relating to private actors.

B. Respondents Attempt To Obscure the Clear Circuit Split

Respondents also mischaracterize the holdings in *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007) and *Alliance for Community Media v. F.C.C.*, 56 F.3d 105 (D.C. Cir. 1995) ("*ACM*"), in which the Sixth and D.C. Circuits applied traditional state actor tests as a threshold matter in determining that private public access operators were not state actors—precisely the question presented in this case.

Respondents are correct that, in *Wilcher*, the Sixth Circuit did not decide "whether the public access channel there was a designated public forum," Opp. 29, but that is because *it did not need to do so*. Instead, on materially similar facts to those here,[11] the Sixth Circuit properly conducted the state action analysis *first* and held that the private entity operating the public access channel was not a state actor—obviating the need for further inquiry. *See Wilcher*, 498 F.3d at 518-20.

Similarly, the D.C. Circuit in *ACM* properly analyzed whether state action was present under each of this Court's state action tests. *See ACM*, 56 F.3d at 113-16. Like the Sixth Circuit, the D.C. Circuit rejected the suggestion—made by Respondents here—that "by calling … PEG channels 'public forums' they may avoid the state action problem" because "that essential element cannot be supplied by treating access channels as public forums." *Id.* at 121-23.

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11. In *Wilcher* the Sixth Circuit decided the threshold state action question (finding no state action) on facts suggesting a much closer connection between government and the private entity, including that the private operator of the public access channel contracted directly with the city, which had the right to veto the rule changes at issue there. 498 F.3d at 518.

While *Denver Area* reversed *ACM* on other grounds, it did *not* call into question the ruling on the threshold state action analysis. 518 U.S. at 737-42. Indeed, the Second Circuit dissent observed that this portion of the *ACM* decision was left intact by this Court. *See* Pet. App. 30a.

Finally, Respondents downplay the import of the D.C. Circuit decision in *Glendora v. Sellers*, No. 03-7077, 2003 WL 22890043 (D.C. Cir. Nov. 25, 2003), calling it an "unpublished, per curiam decision." Opp. 31. This characterization ignores the fact that that the D.C. Circuit affirmed the state action holding in *ACM*, even after *Denver Area* was decided.

II. THIS CASE RAISES A CRITICAL ISSUE OF IMPORTANT PUBLIC CONCERN

Respondents attempt to trivialize the significant matters of public concern identified in the Petition by referring to them as a "parade of horribles." Opp. 32. But this dismissal ignores the fact that we stand at a moment when the very issue at the heart of this case—the interplay between private entities, nontraditional media, and the First Amendment—has been playing out in the courts, in other branches of government, and in the media itself. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 17-cv-5205, 2018 WL 2327290 (S.D.N.Y. May 23, 2018) (whether President's Twitter account was public forum); *Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 WL 1471939 (N.D. Cal. Mar. 26, 2018) (First Amendment claims against YouTube, Google); *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017) (whether municipality's Facebook page was "limited public forum").

It is critical that this Court guide the lower courts in addressing these claims. Respondents' suggestion that further "percolation" is warranted, Opp. 31, n. 10, is self-serving and wrong. The current divide in authority is intractable, creates a patchwork of inconsistency across the nation and leaves private content providers around the country (and across multiple mediums) with untenable uncertainty over whether they are part of the government.

The Second Circuit—which includes a major media hub—is very influential, and its decision could affect a broad swath of private entities with minimal connections to government, like MNN. Respondents try to distract from this concern by accusing petitioners of "los[ing] sight of the fundamental principle that only the *government* may designate a non-traditional place as a public forum." Opp. 32. But that is precisely the point: once Respondents' manufactured argument is taken apart, it is clear that New York never *designated* MNN as a public forum. And if the minimal nexus MNN has to the government is sufficient to find state action, then entities such as Time Warner, Facebook, Twitter, and National Public Radio, all of which have similar (though minimal) connections to government, should be concerned.

For example, in August 2018, Facebook, Google, Spotify, and Twitter—all private entities—removed content posted by Alex Jones. The removed content was deemed "hate speech" and banned pursuant to the rules and regulations of these private companies, but the ensuing debate has drawn heightened attention to the interplay between private companies and First Amendment rights. *See, e.g.*, Alan Feuer, *Free Speech Scholars to Alex Jones: You're Not Protected*, N.Y. Times, Aug. 7, 2018; Evan

Slavitt, *Pre-emptive strike Alex Jones' free speech is as reprehensible as he is*, Boston Herald, Aug. 11, 2018; Steve Coll, *Alex Jones, The First Amendment, and The Digital Public Square*, The New Yorker, Aug. 20, 2018; *Infowars, Alex Jones test the limits of free speech on Twitter and beyond*, CNET, Aug. 9, 2018; *see also* Floyd Abrams, *Keep The Government Out of Google Searches*, Wash. Post, Aug. 28, 2018.

Certiorari is necessary to resolve these recurring issues involved in new and changing media platforms and resolve confusion resulting from the Second Circuit's split from its sister Circuits.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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