No. 17-1702

IN THE

Supreme Court of the United States

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

Petitioners,

vs.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Whether the Second Circuit erred in failing to apply this Court's "state action" tests and in adopting a *per se* rule that private operators of public access channels are "state actors" for constitutional purposes, even where the state has no control over the private entity's board, policies, programs, facilities or operations, provides none of its funding, and is not alleged to have been involved in the conduct challenged in the pleadings.

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioners Manhattan Community Access Corporation, Daniel Coughlin, Jeanette Santiago, and Cory Brice[1] were Defendant-Appellees in the court of appeals in No. 16-4155. Petitioner Manhattan Community Access Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Respondents DeeDee Halleck and Jesus Papoleto Melendez were Plaintiff-Appellants in the court of appeals in No. 16-4155.

The City of New York was a Defendant-Appellee in the court of appeals in No. 16-4155 but has not joined in this appeal.

[1] Petitioner Cory Brice's name was misspelled "Bryce" in the Amended Complaint.

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JURISDICTION

The Second Circuit issued its opinion on February 9, 2018, and denied Petitioners' request for rehearing *en banc* on March 23, 2018. Pet. App. 54a-55a. Petitioners filed a petition for writ of certiorari on June 21, 2018, which this Court granted on October 12, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. I, "Congress shall make no law . . . abridging the freedom of speech . . . ."

This case also involves United States Code, Title 42, Section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case is about preserving the confines of the "state action" doctrine, which separates purely private conduct from governmental action for constitutional purposes. This Court has commanded "[c]areful adherence" to the state action doctrine to "preserve[] an area of individual freedom by limiting the reach of federal law." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). At the same time, this narrow approach "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. The Second Circuit did not adhere—let alone carefully—to the state action doctrine.

Manhattan Community Access Corporation ("**MNN**") is an independent, not-for-profit company that operates two access centers and four public access channels in the Borough of Manhattan in New York City (the "**City**"). More than *25 years ago*, the Manhattan Borough President chose MNN to replace Time Warner as the independent operator of the public access channels in Manhattan. The Manhattan Borough President has the right to nominate only two of MNN's 13 board directors. The other directors are independent; the City, therefore, does not control MNN's board. Moreover, Respondents did not—and could not—allege that the City plays *any role whatsoever* in MNN's operations, programs, policies, personnel decisions, facilities, or funding. The vast majority of MNN's funding comes from the cable operators that provide cable service in Manhattan via independent agreements between MNN and

those cable operators. MNN has no contract with the City.

Respondent Halleck has produced programs that have periodically appeared on MNN's public access channels. Respondent Melendez has taken part in some of MNN's community-based trainings and has appeared in at least one program shown on MNN. Respondents brought this Section 1983 claim alleging violations of the First Amendment, against MNN, some of its employees, and the City, arising out of disciplinary actions taken against them for violating MNN's internal rules and regulations.

On a motion to dismiss, the district court reviewed the allegations in light of each of this Court's state action tests and correctly determined that Respondents had not plausibly alleged that MNN is a state actor under any of them. On appeal, however, the Second Circuit ignored these tests altogether. Instead, relying on Justice Kennedy's partial concurrence and partial dissent in *Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996), the Second Circuit held 1) that MNN's public access channels are designated public fora of unlimited character, and then determined 2) that Petitioners are, therefore, state actors because, in 1991, the Manhattan Borough President chose MNN to operate the public access channels on Time Warner's cable system in Manhattan.[2]

The decision below should be reversed as to Petitioners. Respondents have not alleged that MNN is a state actor under any of this Court's tests establishing the exceptional conditions warranting hold-

[2] The Second Circuit also affirmed the district court's dismissal of the City. Petitioners do not challenge that holding.

ing a private entity subject to the First Amendment. MNN does not carry out a traditional and exclusive public function, it is not in a symbiotic relationship with the City, the allegations in the pleadings make clear that MNN did not act pursuant to any government compulsion, and the City does not control MNN through its board or otherwise.

In determining *on the pleadings* that MNN is a state actor, the Second Circuit applied what is essentially a *per se* test that ignores the vast differences in public access operators around the country. Equally troubling is the analysis itself: looking first at the forum (in this case public access channels), determining that the electronic forum is a *constitutional* public forum, and then working *backwards* to find that its operators are therefore state actors. That analysis flies in the face of Supreme Court precedent. It also ignores the differences among public access providers, ignores the concerns raised by the plurality in *Denver Area* about adopting a categorical approach, and ignores the radical changes that have occurred in the decades since *Denver Area*. Indeed, the rapid expansion of the Internet into the daily lives of most Americans and the rise of social media platforms (not to mention the other nooks and crannies of online life) have changed media and media consumption forever. One encounters countless fora every day that resemble (to some degree or other) the proverbial soapbox in the corner of the public park and that to some degree or another arise out of or are subject to local, state, and federal regulation. But that does not make them *constitutional* public fora.

Careful adherence to the state action analysis remains critical for determining those rare instances where private activity can be considered state action. This case does not present one of those instances.

A. The Regulatory and Contractual Framework for Public Access

Cable operators must obtain franchises from local governments in order to lay the cable or optical fibers needed to reach subscribers. Pet. App. 35a; JA19-20, ¶¶ 15-16. Cable television franchising in New York State is regulated by the New York State Public Service Commission ("**PSC**"). Pet. App. 36a; JA21-22, ¶¶ 25-29. Among other things, the PSC regulations require the designation of public, education, and government ("**PEG**") channels in New York. New York Code, Rules and Regulations ("**NYCRR**"), tit. 16, § 895.4(b) (2018). They also set the minimum standards for these channels. *Id.* at § 895.4(c). Specifically, the PSC regulations require that content on public access channels must be "noncommercial" and that access must be on a "first-come, first-served, nondiscriminatory basis." *Id.* at § 895.4(a). The regulations also prohibit cable television franchisees and local governments from exercising editorial control over public access channels. *Id.* at §§ 895.4(c)(8-9). The regulations further provide that "[a]ny interested person may seek a ruling from the [PSC] concerning the applicability or implementation of any provision of this section or any provision of a franchise concerning PEG access upon the filing of a petition." *Id.* at § 895.4(f)(2). The PSC hears challenges by (among others) public access producers to ensure that public access channel operations comply with these regulations. *See, e.g.*, *Amano v. City of New*

York, No. 04-V-0321, 2006 WL 4470759 (N.Y.P.S.C. Aug. 30, 2006).

The Cable Communications Policy Act of 1984, Public Law No. 98-549, 98 Stat. 2779 (1984) (the "**1984 Cable Act**"), requires cable operators to carry *leased* access channels and *allows,* but does not mandate, franchising authorities to require cable operators to set aside PEG channels. 47 U.S.C. §§ 531(a-c); Pet. App. 35a-36a. Among many other things, the 1984 Cable Act prohibits cable operators from exercising editorial control over public access channels. 47 U.S.C. § 531(e); Pet. App. 36a.

In 1991, the City renewed cable franchises in Manhattan, which had previously been awarded to Time Warner Entertainment Company, L.P. Pet. App. 36a-37a. Sections 8.1.1 and 8.1.8 of the franchise agreements between the City and Time Warner provide that Time Warner must set aside certain cable channels for public access programming and that these channels shall be operated by an "independent, not-for-profit, membership corporation" chosen by the Manhattan Borough President. Pet. App. 5a, 36a-37a; JA22, ¶¶ 31-32.

Also in 1991, pursuant to the terms of the franchise agreement between the City and Time Warner, the Manhattan Borough President chose MNN as the independent entity to operate the public access channels set aside by Time Warner in Manhattan. Pet. App. 5a, 37a; JA23, ¶¶ 34-35. MNN has no agreement with the City; it only has agreements with cable operators. JA23, ¶¶ 32-33. The New York state regulations do not require MNN to provide any municipal updates or reports. Instead, the franchise agreements contemplate that the inde-

pendent nonprofit operating the public access channels will adopt its own rules and regulations (without requiring City approval), and the applicable regulations and private agreements do not allow the City to provide any input. Pet. App. 35a-37a.

B. Manhattan Neighborhood Network

MNN is a private nonprofit corporation organized under the laws of the State of New York. JA19, ¶ 11. Petitioner Dan Coughlin is MNN's Executive Director, Jeanette Santiago is MNN's Programming Director, and Cory Brice is MNN's Manager of Production and Facilitation. Pet. App. 6a-7a. MNN is the largest provider of independently produced programming in the country and provides editing, media training and youth classes at its facilities. JA23-25, ¶¶ 37, 39-42, 46.

Since 1991, the Manhattan Borough President has had no control over MNN's operations, policies, finances, or any other aspects of MNN's governance. The Manhattan Borough President can only nominate (subject to board approval) two of MNN's 13 directors. Pet. App. 37a; JA23, ¶¶ 34-36. The remaining directors—the vast majority of the board—are independent. *Id.* MNN receives no funding from the City or the State. JA23, ¶ 35. MNN owns outright its own facilities: its offices and its main studio are on West 59th Street in Manhattan, and MNN also owns and maintains a community facility in East Harlem known as the MNN El Barrio Firehouse Community Media Center. Pet. App. 37a; JA24, ¶ 38.

C. Facts Giving Rise to This Action

Respondent Halleck is a public access producer and Respondent Melendez has participated in MNN's community training programs. Pet. App. 38a-40a; JA24, ¶¶ 39-40. MNN took disciplinary action against Respondents for violating its rules and regulations. Specifically, after Respondent Melendez violated MNN policies by harassing Iris Morales, an MNN employee, MNN withdrew Mr. Melendez's invitation to participate in a community building education program. Pet. App. 38a-40a; JA28, ¶¶ 69-70.

Thereafter, Mr. Melendez appeared in and Ms. Halleck produced a video called "The 1% Visit El Barrio." DeeDee Halleck, *The 1% Visits El Barrio*, YouTube (July 29, 2012), https://www.youtube.com/watch?v=QEbMTGEQ1xc. The program included harassing and threatening language directed toward MNN staff during a lengthy diatribe by Mr. Melendez, spoken while standing outside of the MNN El Barrio Firehouse Community Media Center. Mr. Melendez's monologue included the following:

> 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.

Pet. App. 39a; JA30, ¶ 81 (emphasis added).

Respondents submitted the program to MNN, and it aired on an MNN public access television channel on October 2, 2012. Pet. App. 40a; JA31, ¶ 84. After receiving complaints from its staff that the video in-

cited violence against MNN staff and violated MNN's zero tolerance policy on harassment, MNN barred further airings of the program containing the offending "kills them" language. Pet. App. 40a; JA31-33, ¶¶ 86-88, 95-97. By letter dated October 11, 2012, Respondent Halleck, as the producer of record, was suspended for three months from airing programs over MNN's public access channels. Pet. App. 40a; JA31, ¶¶ 85-87. Following an additional violent confrontation with an MNN employee in July 2013, MNN suspended Respondent Melendez indefinitely from all MNN services and facilities. Pet. App. 40a; JA33-34, ¶¶ 98-109. Also, in August 2013, MNN suspended Respondent Halleck for one year from all MNN services and facilities due in part to her role in the July 2013 violent confrontation. Pet. App. 40a; JA35, ¶¶ 111-14.

D. Procedural History

On October 15, 2015, Respondents filed a Complaint against Petitioners, the City, and Ms. Morales, the MNN employee. JA6. Respondents alleged violations of 42 U.S.C. Section 1983, Article 1, Section 8 of the New York State Constitution, and New York's Open Meetings Law, claiming they were damaged as a result of their respective suspensions. JA6, 16-43. After an exchange of pre-motion to dismiss letters between the parties and a pre-motion conference before the district court, Judge Pauley gave Respondents an opportunity to amend their Complaint to address Petitioners' arguments in support of dismissal (including the argument that the Petitioners were not state actors). JA6-8. Respondents amended their Complaint and removed Ms. Morales as a defendant. JA18-19, ¶¶ 10-14.

1. District Court Proceedings

On March 18, 2016, Petitioners and the City moved to dismiss the Amended Complaint, principally on the ground that the pleading did not plausibly allege that MNN and its employees were state actors subject to the First Amendment. JA9-11. Following briefing and oral argument, the district court granted the motion to dismiss in an Opinion and Order dated December 13, 2016. Pet. App. 34a-53a.

The district court dismissed the First Amendment claims against Petitioners, finding that Respondents had failed to allege adequately that MNN was a state actor subject to Section 1983. Pet. App. 44a-53a. The district court held that MNN's actions could not be considered "governmental action for constitutional purposes" under this Court's test in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995), because "among other things, the Manhattan Borough President only has the authority to appoint two of MNN's thirteen board members." Pet. App. 44a.

The district court then discussed this Court's "public function" test, described at length by the Second Circuit in *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008). Pet. App. 45a. Judge Pauley noted that "regulation of free speech in a public forum is 'a traditional and exclusive public function'" and stated that the "public function" test would be satisfied if a public access channel was a constitutional public forum like a sidewalk or park. Pet. App. 45a-46a (citation omitted).

The district court noted that the only Circuits to have considered the issue (the D.C. and Sixth Circuits) both held that public access channels are not

constitutional public fora. Pet. App. 46a-47a, 51a & n.9. The district court also noted that a plurality of this Court in *Denver Area* "found it 'unnecessary' and 'unwise' for the Court to 'definitely [] decide whether or how to apply the public forum doctrine to leased access channels,'" and, by extension, public access channels. Pet. App. 47a-48a (quoting *Denver Area*, 518 U.S. at 749). The district court recognized that Justice Kennedy (along with Justice Ginsburg) would have held that public access channels *are* designated public fora and Justice Thomas (along with Chief Justice Rehnquist and Justice Scalia) would have held that *they are not*. Pet. App. 47a-49a.

The district court concluded that public access channels are not constitutional public fora, adopting what it termed "the consensus view of courts within the Second Circuit." Pet. App. 50a-51a (citations omitted). In making this determination, the district court noted that "MNN is a private company that operates television channels," and "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." Pet. App. 51a (quoting *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 269 (S.D.N.Y. 1995)). Citing the Second Circuit's holding in *Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 267 (2d Cir. 1999), the district court rejected Respondents' argument that "public access channels are designated public fora because they are 'required by government fiat.'" Pet. App. 52a (citation omitted).

The district court also dismissed the First Amendment claims against the City, noting that Respondents' "sole allegation against the City [was] the bald assertion that it was 'aware that MNN has cen-

sored plaintiffs' and other cable access programming,'" which was an insufficient allegation under the standard for municipal liability set forth in *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). Pet. App. 43a (quoting JA38, ¶ 126).

2. Appellate Proceedings

Respondents filed a timely Notice of Appeal to the Second Circuit on December 14, 2016. JA1.

On February 9, 2018, the Second Circuit issued a splintered decision with three separate opinions. Two Judges (Newman and Lohier, JJ.), writing separately, voted to reverse the district court's dismissal of Petitioners but affirm its dismissal of the City. Pet. App. 1a-18a. Judge Newman authored the majority opinion (the "**Majority**"), Judge Lohier authored a concurring opinion (Pet. App. 19a-21a), and Judge Jacobs authored a dissent. Pet. App. 22a-33a.

The Majority acknowledged that, because MNN is a private entity, "the viability of the Plaintiffs' First Amendment claim against it and its employees depends on whether MNN's actions can be deemed state action." Pet. App. 9a (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)). But instead of engaging in a traditional state action inquiry as established by this Court, the Majority skipped to consideration of whether public access channels (regardless of who operates them) are "public fora" for First Amendment purposes. Pet. App. 10a.

Relying on Justice Kennedy's partial concurrence and partial dissent in *Denver Area*, the Majority held that:

> where, as here, federal law authorizes setting aside channels for public access to be 'the electronic marketplace of ideas,' state 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, those channels are public forums.

Pet. App. 13a-14a. The Majority noted that, "whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors." Pet. App. 14a. The Majority then summarily concluded that the necessary connection between MNN and the City "is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels." Pet. App. 14a-15a.

The Majority attempted to distinguish its holding from *Loce*, where the Second Circuit had determined that "[t]he fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action." *Loce*, 191 F.3d at 267. The Majority dismissed any comparison to *Loce* because *Loce* involved "leased access" channels as opposed to "public access" channels. Pet. App. 15a.

The Majority acknowledged that other courts have rejected characterizing public access channels as public fora, and that, specifically, the D.C. and Sixth Circuits "have not considered public access channels to be public forums." Pet. App. 16a & n.8 (citing *Alliance for Cmty. Media v. F.C.C.*, 56 F.3d 105, 123 (D.C. Cir. 1995) ("***ACM***") (*en banc*) (finding "no state action … because that essential element cannot be supplied by treating access channels as public forums"), *rev'd in part on other grounds sub nom., Denver Area*, 518 U.S. at 768; *Wilcher v. City of Akron*, 498 F.3d 516, 519-22 (6th Cir. 2007) (holding private operator of public access channel was not a state actor after applying traditional state actor tests, and therefore not reaching subsequent public forum analysis)). But the Majority noted that it did not agree with these decisions and instead agreed with Justice Kennedy's partial concurrence and partial dissent in *Denver Area*. Pet. App. 17a.

Judge Lohier's concurrence below added that "in the specific circumstances of this case we might also rely on the public function test" to find state action. Pet. App. 19a. Judge Lohier concluded that MNN exercised the "traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels" because MNN's programming relates to, "*in a word, democracy*." Pet. App. 20a-21 (emphasis added). In reaching this conclusion, Judge Lohier took judicial notice of cherry-picked portions of MNN's website that were not part of the record below and concluded that MNN largely offered political-type programming, ignoring the other types of programming and non-expressive services that MNN provides. Pet. App. 20a.

The concurrence below acknowledged that its "public function" analysis was in direct conflict with the Sixth Circuit's *Wilcher* decision. Pet. App. 19a. Where *Wilcher* found the "public function" test for state action was not met because "TV service is not a traditional service of local government," the concurrence below held that a public access operator performs a traditional and exclusive government function, satisfying the "public function" test, because it is inappropriate to look at public access as simply an "entertainment facility." Pet. App. 19a-20a (quoting *Wilcher*, 498 F.3d at 519).

Unlike the Majority, Judge Jacobs' dissent applied the traditional state action analysis, as other Circuits have, and determined that the pleadings did not allege that MNN was a state actor. The dissent noted that "[t]he majority conclusion that MNN is a state actor opens a split with the Sixth Circuit; considerably worse, it opens a split with the Second Circuit." Pet. App. 33a. Judge Jacobs explained that "[a] private entity may become a state actor ***only*** under the following limited conditions," and listed the three state action tests discussed by the Second Circuit in *Sybalski*, 546 F.3d at 257. Pet. App. 23a (emphasis added). The dissent applied each of these tests and concluded that MNN was not a state actor. Pet. App. 23a-32a.

First, the dissent below determined that MNN was not a state actor under the "compulsion test" because "MNN's designation in a franchise agreement and regulation by a municipal commission do not in and of themselves demonstrate that MNN is 'controlled' or 'compelled' by the state." Pet. App. 23a-24a. Judge Jacobs further noted that Respondents made "no allegation of government involvement in

the[ir] suspensions from which state action can be inferred." Pet. App. 24a.

The dissent next determined that MNN was not a state actor under the "joint action" test because neither "the statutory guidelines for cable access [n]or the borough's oversight activities establish joint action between the Government and MNN" and because the City did not control a majority of MNN's board as required under *Lebron*. Pet. App. 24a.

Finally, the dissent noted that MNN was not a state actor under the "public function" test because "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." Pet. App. 25a (internal quotation and citation omitted).

The dissent below would have held that *Loce* (which addressed leased access channels) controlled and that the operation of public access channels does not constitute state action simply because such channels may be required by government fiat. Pet. App. 26a-27a. "[T]he logic of *Loce*," according to the dissent, "applies with equal force to public-access programming" because "[c]able operators are equally obligated to provide both 'forums': federal law requires them to set aside a portion of their capacity for leased access … and permits franchising authorities to require (as the relevant one does) a similar set-aside for public access." Pet. App. 28a. The dissent below concluded that, "if anything, the *Loce* analysis applies to public-access channels *a fortiori*." Pet. App. 27a.

By Order dated March 23, 2018, the Second Circuit declined to grant Petitioners' request for rehearing. Pet. App. 54a-55a.

On June 21, 2018, Petitioners filed a timely petition for writ of certiorari. By order dated October 12, 2018, this Court granted the petition.

SUMMARY OF ARGUMENT

Petitioner MNN is not a state actor or part of the government under any of this Court's state action tests. MNN is a private nonprofit that operates four public access channels in Manhattan. The City does not control MNN's board of directors and plays *no role whatsoever* in MNN's operations, programs, policies, personnel decisions, facilities, or funding.

Nonetheless, the Second Circuit held—*on the pleadings*—that Petitioners are state actors, subject to constitutional liability under Section 1983. In reaching this conclusion, the Second Circuit held first that public access television channels are *constitutional* public fora. This holding was based on Justice Kennedy's partial concurrence and partial dissent in *Denver Area*. Justice Kennedy would have held that public access stations are designated public fora of unlimited character, but that position was either outright rejected or deemed premature by seven members of this Court. The Second Circuit then worked backwards, holding that if MNN's channels were constitutional public fora, Petitioners were therefore state actors because—more than 25 years ago—the Manhattan Borough President designated MNN to operate those channels.

There is no precedent for skipping the state action analysis and jumping straight to consideration of whether a forum is (by its very nature) a *constitutional* public forum. This analysis is faulty because the determination of the *forum* question (which considers the extent of government control of government-owned property) *assumes* an answer to the *state action* inquiry. This is why the courts around the country that have considered whether public ac-

cess stations are public fora have uniformly applied the threshold state action analysis instead of looking at the nature of the forum in a vacuum. Moreover, the Second Circuit's holding creates a one-size-fits-all, *per se* rule that would place all public access channels in the state action bucket regardless whether the channel was run by a municipality, a private independent organization or the cable operator.

The Second Circuit's backward state action analysis and categorical forum determination ignore the concerns expressed by the *Denver Area* plurality—that public access channels are run by very different entities, with capable systems of local accountability, and that technology appeared to be rapidly evolving. These concerns are even more pressing today than they were in 1996, given the proliferation of new forms of media. And there are certainly countless new types of fora—including social media platforms—that bear *some* level of resemblance to traditional public fora. But they are not automatically *constitutional* public fora. That is why the threshold state action inquiry is critical.

The Second Circuit chose to ignore this Court's threshold state action tests. And Petitioners are not state actors under any of those tests.

MNN is not "part of the government" under this Court's *Lebron* decision because, even though the Manhattan Borough President long ago designated MNN to operate the public access channels in Manhattan, the City retained no control over MNN. MNN is not a state actor under the "public function" test because the operation of television stations is not a traditional and exclusive role of government.

MNN is likewise not a state actor under the "compulsion" or "coercive power" test because there were no allegations that the City coerced or cajoled MNN into anything—much less the challenged conduct at issue in the Amended Complaint. MNN is also not a state actor under the "joint action," "close nexus," or "symbiotic relationship" test because there were no allegations that the City and MNN worked together or were joint participants in either the actions complained of or anything else. Lastly, MNN is not a state actor under the "entanglement" or "entwinement" theory because there is no ongoing connection between MNN and the City of New York—and certainly nothing approaching the "pervasive entwinement" described in *Brentwood*.

Here, applying this Court's proper state action inquiry, the Amended Complaint does not plausibly allege that Petitioners are state actors, and the Amended Complaint was properly dismissed by the district court.

ARGUMENT

I. THE SECOND CIRCUIT'S ANALYSIS IS INCONSISTENT WITH THIS COURT'S STATE ACTION CASES AND CREATES A NEW, UNWORKABLE STATE ACTION EXCEPTION

The decision below is an unprecedented and unwarranted departure from this Court's decades-long treatment of the constitutional liability of private actors. Relying on Justice Kennedy's partial concurrence and partial dissent in *Denver Area*, the Majority below determined first that Manhattan's public access channels are *constitutional* public fora:

> where, as here, federal law authorizes setting aside channels for public access to be 'the electronic marketplace of ideas,' state 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, those channels are public forums.

Pet. App. 13a-14a. The Majority then worked backwards. Recognizing that private entities cannot be held liable for constitutional violations unless they are deemed to be "state actors," the Second Circuit continued: "[t]hat [sufficient] connection [to governmental authority] is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels," because, thereby, "[MNN employees] are exercising precisely the authority to administer such [designated public] forum conferred upon them by a senior municipal official." Pet. App. 14a-15a.[3]

The Second Circuit's analysis places the cart squarely in front of the horse, departs from this

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[3] Perhaps more egregiously, the Second Circuit made this determination on a motion to dismiss. It determined, under the pleading standard this Court articulated most recently in *Iqbal*, that the facts alleged "state a claim to relief that is *plausible on its face*" with respect to whether Petitioners could be considered state actors. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted and emphasis added). But the Amended Complaint does not plausibly allege any of the state action indicia that this Court has considered.

Court's state action doctrine, and creates a rubric that is fraught with problems.

A. There is no Precedent for Skipping the Threshold State Action Analysis

The Constitution does not impose liability on private actors except in those rare circumstance where a nominally private actor is deemed to be a "state actor." *See Blum v. Yaretsky*, 457 U.S. 991, 1002-03 (1982) (the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful") (internal quotation and citation omitted); *Lugar*, 457 U.S. at 937 ("[I]t is a fundamental fact of our political order" that constitutional liability is only applied to conduct "fairly attributable to the State."); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("conduct of private parties lies beyond the Constitution's scope in most instances" and only where private entities "must be deemed to act with the authority of the government" are such private actors "subject to constitutional constraints").

In determining those exceptional cases where private parties can be subject to constitutional claims, this Court has ***never*** skipped the state action inquiry. To the contrary: this Court has consistently commanded "[c]areful adherence to the 'state action' requirement [in order to] preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 936; *see also Tarkanian*, 488 U.S. at 191 (same); *Edmonson*, 500 U.S. at 619 (a preliminary determination that a private entity acted under color of state law respects the "great object of the Constitution," which is to "permit citizens to structure their private relations as they choose").

This Court most recently addressed these issues in *Brentwood*. There, the Court noted:

> The judicial obligation is not only to 'preserv[e] an area of individual freedom by limiting the reach of federal law' and avoi[d] the imposition of responsibility on a State for conduct it could not control,' … but also to assure that constitutional standards are invoked 'when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.

531 U.S. at 295 (emphasis in original) (quoting *Tarkanian*, 488 U.S. at 191; *Blum*, 457 U.S. at 1004).

Indeed, as described below in Section I(B)(2), other than the Second Circuit in this case, the Circuits and district courts that have considered the constitutional liability of private operators of public access channels have *uniformly* first applied the state action inquiry. The Second Circuit's failure to make this threshold analysis undermines decades of constitutional jurisprudence crafted with the goal of separating purely private conduct from government conduct subject to the First Amendment.

B. There is no Precedent for the Second Circuit's Public Forum Determination

1. Denver Area *did not Hold That Public Access Channels are Constitutional Public Fora*

Justice Breyer's plurality decision in *Denver Area* (joined in relevant part by Justices Stevens,

O'Connor, and Souter) explicitly refused to consider whether public access channels were public fora, finding it "premature." 518 U.S. at 742. The plurality was concerned with "changes taking place in the law, the technology, and the industrial structure related to telecommunications" and did not wish to "declare a rigid single standard, good for now and for all future media and purposes." *Id.* at 741-42; *see also id.* at 742 ("[W]e believe it *unwise and unnecessary* definitively to pick one analogy or one specific set of words now." (emphasis added)).

Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) would have held that public access channels *are not* constitutional public fora. *Id.* at 826. As Justice Thomas wrote, "[c]able systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum." *Id.* at 827. Justice Thomas also noted that this Court has "never even hinted that regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights, could justify creation of a public forum." *Id.* at 829. Justice Thomas concluded that "the numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum." *Id.* at 831.

These concerns raised in 1996 remain compelling reasons to reject the Second Circuit's analysis and conclusion.

2. *Where Courts Have Found Public Access Channels to be Public Fora, They Have First Applied State Action Tests*

The Majority below suggests that courts considering "whether a public access channel is a public forum … have reached conflicting results." Pet. App. 16a. But this is inaccurate. Rather, courts faced with similar issues have *uniformly* engaged in the threshold state action analysis first. Where those courts found no state action, they did not engage in any further forum analysis.[4] For example, the Sixth and D.C. Circuits both considered whether private operators of public access channels are state actors. *See Wilcher*, 498 F.3d at 519-22; *ACM*, 56 F.3d at 113-21. Both Circuits applied the traditional state action tests and concluded that private operators of public access channels are not state actors. *See id.* Moreover, the D.C. Circuit flatly rejected the suggestion that "by calling [public access] channels 'public forums' they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of

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[4] The Second Circuit's decision conflicts with its own prior decisions that engaged in threshold state action analysis to determine the constitutional status of private operators of leased and public access channels. *See Bernas v. Cablevision Sys. Corp.*, 215 Fed. App'x 64, 68 (2d Cir. 2007) (applying state action tests to private actor operating public access channel, finding tests not satisfied, and not engaging in forum analysis); *Loce*, 191 F.3d at 266-67 (applying "close nexus" state action test to cable operator providing leased access channels and finding no state action). Petitioners presented this case for *en banc* review given this departure from precedent, but the Second Circuit declined such review. Pet. App. 54a-55a.

the location of their speech." *ACM*, 56 F.3d at 121.[5]

Similarly, district courts around the country considering the constitutional liability of private operators of public access channels have routinely conducted the state action inquiry first, and where they have found no state action, they then have no reason to engage in forum analysis. *See, e.g.*, *Loren v. City of New York*, No. 16-cv-3605, 2017 WL 2964817, at *4 (S.D.N.Y. July 11, 2017) (applying compulsion, joint action, and public function tests and finding no state action); *Clorite v. Somerset Access Television, Inc.*, No. 14-cv-10399, 2016 WL 5334521, at *9-10 (D. Mass. Sept. 20, 2016) (applying *Lebron* analysis to public access channel and finding no state action, and noting that forum analysis would be necessary only if state action was present); *Griffin v. Pub. Access Cmty. Television*, No. 10-cv-602, 2010 WL 3815797, at *2-4 (W.D. Tex. Sept. 27, 2010) (applying compulsion, joint action, and public function tests and finding no state action); *Hebrew v. Houston Media Source, Inc.,* No. 09-cv-3274, 2010 WL 2944439, at *4-7 (S.D. Tex. July 20, 2010) (same); *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005) (same); *Huston v. Time Warner Entm't*, No. 03-cv-0633, slip op. at 3-5

[5] On appeal, this Court in *Denver Area*, 518 U.S. at 737-43, found that the state actor inquiry was not necessary to determine the constitutionality of the challenged statute and instead considered whether the regulations were sufficiently tailored—leaving the portion of the D.C. Circuit's decision holding that public access channel operators are not state actors undisturbed. Indeed, seven years after *Denver Area* was decided, the D.C. Circuit once again found that the private operator of a public access channel was not a state actor. *See Glendora v. Sellers*, No. 03-7077, 2003 WL 22890043 (D.C. Cir. Nov. 25, 2003).

(N.D.N.Y. Mar. 25, 2004) (Doc. 31) (same), *aff'd on other grounds*, 127 Fed. App'x 528 (2d Cir. Mar. 31, 2005); *Glendora v. Tele-Commc'ns, Inc.*, No. 96-cv-4270, 1996 WL 721077, at *3 (S.D.N.Y. Dec. 13, 1996) (same); *Glendora v. Marshall*, 947 F. Supp. 707, 712 (S.D.N.Y. 1996) (same); *Glendora*, 893 F. Supp. at 269-70 (same).

Even in those cases where courts have found public access channels to be constitutional public fora, these findings were made *after* some threshold state action test was satisfied—and, then, only upon factual allegations or the factual record making clear that the government *directly controlled* the public access channel. *See, e.g.*, *Egli v. Strimel*, No. 14-cv-6204, 2015 WL 5093048, at *3-4 (E.D. Pa. Aug. 28, 2015) (first holding that the complaint adequately alleged state action, and then engaging in forum inquiry to determine level of judicial scrutiny); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 89-91 (D. Mass. 2002) (noting that the first inquiry "is whether [the public access channel] is a state actor," and the "second issue is whether [it] is a 'public forum'"; finding that *Lebron* test was met, triggering inquiry into nature of forum to determine level of constitutional review); *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1337-38 (N.D. Ga. 1999) (applying the *Lebron* analysis and concluding that, where the City of Atlanta retained control over the public access center, public access channel "[wa]s an agency of the City for purposes of guaranteeing constitutional rights"; thereafter, engaging in forum analysis); *cf. Horton v. City of Houston, Tex.*, 179 F.3d 188, 190 n.3 (5th Cir. 1999) (where parties did not dispute the presence of state action, engaging in forum analysis).

In a rare subset of cases, the government so directly controls and operates the public access channel or its allegedly speech-restricting conduct that the state action element is presumed and courts appropriately find the public access channel to be a constitutional public forum. *See, e.g.*, *Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1401-02 & n.4 (8th Cir. 1997) (where the city and public access channel operator jointly disciplined producers with objectionable content, court proceeded to forum analysis and determined channel could not discriminate based on viewpoint); *Brennan v. William Paterson Coll.*, 34 F. Supp. 3d 416, 419-21, 426-30 (D.N.J. 2014) (where township owned public access channel, which state university controlled and operated, court determined that constitutional claim was plausibly alleged and found it imprudent to resolve at that juncture the exact nature of the forum); *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 52-53 (D. Me. 2002) (predicting on motion for temporary restraining order that court would treat city-controlled public access channel as a designated public forum where municipality itself restricted plaintiff's speech by shutting down public access channel); *Britton v. City of Erie*, 933 F. Supp. 1261, 1264-66, 1268-69 (W.D. Pa. 1995) (where city created local authority, pursuant to statute, to control public access channels, and City Council voted to transfer all of its assets, equipment, and liabilities to the City itself, engaging in forum analysis and determination of whether challenged action was a reasonable government restriction); *cf. ACM*, 56 F.3d at 121 ("But a 'public forum,' or even a 'nonpublic forum,' in First Amendment parlance is government property. … State action is present because the property is the

government's and the government is doing the restricting.").[6]

The Second Circuit's analysis deviates from this Court's precedent and from the analysis and conclusions reached on similar facts by its sister Circuits.

3. This Court has Consistently Held That Privately-Owned and Controlled Fora are not Constitutional Public Fora

This Court's reluctance to characterize public access television channels as *constitutional* public fora in *Denver Area* is consistent with its long history holding that private property does not qualify as a constitutional public forum. Instead, the Court has invariably described public fora as *government-owned or -controlled property*. *See, e.g.*, *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums."); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) ("We have previously used what we have called 'forum analysis' to evaluate government restrictions on

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[6] Even in such cases, courts have acknowledged the difficulty in applying forum analysis to public access channels. *See, e.g.*, *Horton*, 179 F.3d at 192 ("the public forum doctrine should not be extended in a mechanical way to the very different context of public television-broadcasting"; forum analysis presented a "conundrum," which the court did not ultimately address); *Demarest*, 188 F. Supp. 2d at 91, 93 (whether public access channel is a public forum is "open to debate" and noting that, "[f]ortunately, this motion does not require the court to resolve the *Denver Area* conundrum").

purely private speech that occurs on government property."); *U.S. v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) ("to create [a designated public] forum, the government must make an affirmative choice to open up its property for use as a public forum"); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) ("the government creates a designated public forum when it makes its property generally available to a certain class of speakers"); *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (constitutional forum analysis entails "assessing restrictions that the government seeks to place on the use of its property").

Despite this clear precedent, Respondents have previously argued that dicta in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), extends the public forum analysis to "private property dedicated to public use." *Id.* at 801. But *Cornelius* only makes this statement in passing, with no elaboration, analysis or discussion. *See id.* at 801-06. Indeed, *Cornelius* itself dealt with *government-owned* property and engaged in its forum analysis in that light. *See id.* at 801.

Both before and since *Cornelius*, this Court has outright rejected the argument that private property is subject to constitutional forum analysis. *See Lee*, 505 U.S. at 681 (holding that constitutional character of government-owned airport terminal cannot be determined by analogy to bus and rail stations: "much of the evidence [relating to the latter] is irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership") (emphasis in original); *id.* at 698 (Kennedy, J., concurring) (acknowledging that "private spaces of similar character are not subject to the dic-

tates of the First Amendment"); *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976) (calling the argument that the First Amendment reaches privately-owned spaces, or "'private property [dedicated] to public use'" an "'attenuated doctrine'") (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1968)); *see also Denver Area*, 518 U.S. at 742 ("We therefore think it premature to answer the broad questions that Justices Kennedy and Thomas raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum."); *id.* at 827 (Thomas, J., dissenting) (referring to the *Cornelius* excerpt regarding private property as "dictum").

Indeed, Respondents' position would have to rely on the lone case where this Court found First Amendment rights on privately-owned and controlled property, *Marsh v. Alabama*, 326 U.S. 501 (1946),[7] but *Marsh* is limited to its facts, which are not applicable here. There, the state of Alabama permitted the Gulf Shipbuilding Corporation, a private company, to build a "company town" called Chickasaw. *Id.* at 502-03. This Court noted that, other than its private ownership, Chickasaw "has all the characteristics of any other American town": *i.e.*, paved streets and sidewalks, a sewer system, a business district, a police force and a federal post office. *Id.* Several Jehovah's Witnesses were arrested for trespassing under a state statute when they tried to

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[7] In *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324-25 (1968), this Court found that a privately-owned shopping mall could not exclude a union that was protesting labor issues at a store at the mall. *Logan Valley* was thereafter overturned by *Lloyd*, 407 U.S. 551, as recognized by *Hudgens*, 424 U.S. at 517-18.

hand out religious pamphlets on Chickasaw's streets. *Id.* at 503-04. The Court held that, because the private company was performing the exclusively governmental function of operating a municipality, it was subject to the Constitution. *Id.* at 509-10.

Marsh is a unique case—and this Court has subsequently limited its holding to its unique facts. In his "vigorous dissent" in *Logan Valley*, 391 U.S. 308 (1968), *abrogated by Hudgens*, 424 U.S. 507, Justice Black—the author of the *Marsh* opinion—resisted the Court's expansion of the *Marsh* holding to a private shopping mall. 391 U.S. at 328-33 (Black, J., dissenting). Justice Black wrote in his *Logan Valley* dissent: "Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town." *Id.* at 332 (emphasis in original). As this Court noted in *Flagg Bros.*, "[t]his Court ultimately adopted Mr. Justice Black's interpretation of the *limited reach* of *Marsh* in *Hudgens* … in which it announced the overruling of *Logan Valley*." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978) (emphasis added); *see also Lloyd*, 407 U.S. at 561-62 (noting that *Marsh* dealt with "an economic anomaly of the past, 'the company town,'" which "'functionally' [was] no different from municipalities of comparable size" and its holding was "simply … that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied"). Here, there are no allegations that MNN has assumed "*all* the attributes of a town"—or anything like that. *Logan Valley*, 391 U.S. at 332 (Black, J., dissenting) (emphasis in original).

The "limited reach of *Marsh*" therefore has no applicability here. *Flagg Bros.*, 436 U.S. at 159.

4. The Majority's Public Forum Determination Effectively Imposes a per se *Rule That all Public Access Channels are State Actors*

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court cautioned against adopting *per se* tests for state action:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the [Constitution]'s embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account '[d]ifferences in circumstances [which] beget appropriate differences in law.'

365 U.S. at 725-26 (quoting *Whitney v. State Tax Comm'n*, 309 U.S. 530, 542 (1940)); *Burton*, 365 U.S. at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the

State in private conduct be attributed its true significance.").

The Majority below attempted to cabin its holding to the facts alleged in this case, stating 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. But the Majority's reasoning would sweep most—if not all—public access channels into the state actor category. Indeed, the same boilerplate criteria the Second Circuit relied on (*i.e.*, that public access is: authorized by federal law; mandated by state law; and designated by a franchise authority (*id.* at 13a-14a)) will apply to many—if not all—public access channels, all of which are creatures of federal and state law and local contracts.

The holding, therefore, amounts to a *per se* declaration that all public access channels in the Circuit are constitutional public fora, regardless of the type of operator or the nature and degree of government involvement with the channel or the operator. For example, all cable franchisees in New York are *required* to set aside public access channels by a combination of federal law, state regulation, and franchise agreements; the Majority's analysis would necessarily convert all private operators of these channels—including cable operators such as Time Warner Cable—and their employees into state actors.[8] This adoption of a "one-size-fits-all" rule—

[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 designation of the Manhattan Borough President. 16 NYCRR § 895.4(c)(1). For example, Time Warner Cable (now Spectrum) operates a public access television channel in Ithaca, New York. *See* Pegasys,

particularly on the pleadings—is inconsistent with this Court's caution against categorical rules and ignores the far more critical factual inquiry of whether (and to what extent) there is government control over that public access channel.

Indeed, the Second Circuit's reasoning ignores the fact that, as this Court explained in *Denver Area*, public access channels have historically been run in various configurations and, most importantly, by a diverse set of operators: "Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner." *Denver Area*, 518 U.S. at 761 (plurality opinion). More than twenty years later, that is still the case.[9] The Second Circuit's decision threatens to obscure these important differences.

In addition to lacking precedent, the Second Circuit's proposed shortcut around the traditional state action analysis has obvious flaws. Looking at the nature of the forum instead of looking for state action confuses the question. Certainly the quad of a

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http://pegasys.webstarts.com/index.html (last visited Dec. 3, 2018).

[9] There are over two thousand community PEG stations across the country run by a diverse mix of private nonprofit entities, cable operators, educational institutions, governmental entities, and others, according to the Community Media Database. *See* Community Media Database, http://communitymediadatabase.org/ (last visited Dec. 3, 2018) (select Community Access TV / Spreadsheet Directory; listing community access stations in each state along with category of operating entity).

private college looks and feels like the quad of a public college, but that does not transform it into a constitutional public forum—even where a raft of regulation covers how a private college operates. Similarly, many social media platforms are (in some sense) the "equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet." *Denver Area*, 518 U.S. at 791 (Kennedy, J., concurring in part and dissenting in part) (internal quotation and citation omitted). But that does not make them constitutional public fora. The determination of whether a forum is a constitutional public forum must depend on the predicate existence of state action in order to separate private conduct from constitutionally-subject action in any meaningful way.

C. The Second Circuit's Belated State Action Determination is Tautological and Insufficient

After first determining that MNN's public access channels are constitutional public fora, the Majority reasoned that the Manhattan Borough President's decision in 1991 to have MNN operate Manhattan's public access channels constituted "[t]hat [sufficient] connection [to governmental authority]" to find state action. Pet. App. 14a-15a. But this belated and tautological state actor determination does not bolster the Second Circuit's analysis in any way. Indeed, standing alone, the fact that the Manhattan Borough President chose MNN to operate Manhattan's public access channels over 25 years ago is clearly not enough to show the relevant state action factors this Court has considered, *i.e.*: (1) government coercion of the disciplinary action taken

against the Respondents; (2) joint participation with the government; (3) pervasive entwinement with the government; or (4) direct government control of a government-created entity. And, of course, if "designation" was sufficient to support state action, then any private cable operator, wherever it operates a public access channel, would likewise be a state actor subject to First Amendment claims.

II. HAD THE SECOND CIRCUIT PROPERLY CONDUCTED THE THRESHOLD STATE ACTOR ANALYSIS, IT WOULD HAVE HELD THAT MNN IS NOT A STATE ACTOR OR PART OF THE GOVERNMENT

The Second Circuit applied none of the tests this Court has developed to identify those rare circumstances where a private entity's conduct "can fairly be attributable to the state." *Lugar*, 457 U.S. at 937. Had the Second Circuit properly conducted the state actor analysis, it would have concluded, as the district court did, that MNN is not a state actor or part of the government and therefore cannot be liable for claims under Section 1983.

A. MNN is not a Part of the Government Under the *Lebron* Test Because the Government Does not Control its Board

The City does not control MNN's board, and MNN is therefore not a state actor (or a part of the government) under the analysis in *Lebron*. In *Lebron*, this Court was faced with the question of whether Amtrak was a state actor when it selected content for public displays in New York's Penn Station. 513

U.S. at 401. Justice Scalia's majority opinion noted that it "may be unnecessary to traverse that difficult terrain [of deciding whether particular private action might be deemed that of the state]" if Amtrak was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 378, 394. In other words, the Court did not need to decide whether the particular conduct at issue constituted state action if Amtrak was deemed part of the government itself.

In making that determination, the Court considered Amtrak's genesis, its relationship with the government, and the degree of control the government exercised over Amtrak. *See id.* at 383-86. The Court noted that Amtrak was created specifically by Congressional statute, the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (1970) ("**RPSA**"), which Congress found was necessary "to avert the threatened extinction of passenger trains in the United States" and that "public convenience and necessity require the continuance and improvement" of such rail service. *Id.* at 383-84.

The RPSA specifically "authorize[d] Amtrak's incorporation, … set forth its structure and powers, … and outline[d] procedures under which Amtrak will relieve private railroads of their passenger-service obligations and provide intercity and commuter rail passenger service itself." *Id.* at 384. The RPSA also provided for "many matters of structure and power" with respect to the governance of Amtrak, including how its board of directors would be selected—*i.e.*, six of the nine members would be appointed by the President of the United States, two members by the holders of Amtrak's preferred stock (which was the Unit-

ed States government at the time), and the president of Amtrak as the ninth member, who was selected by the other eight. *See id.* at 385.

Given these facts, and notwithstanding the express disclaimer in the RPSA that Amtrak was not a government agency, the *Lebron* Court found that Amtrak was in fact part of the government for purposes of constitutional liability. *See id.* at 398. The Court held: "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and *retains* for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400 (emphasis added).[10]

Applying the *Lebron* analysis in this case, MNN is not a part of the government. The Second Circuit Majority relied heavily on the fact that the Manhattan Borough President designated MNN to be the nonprofit operator of public access channels in Manhattan. But that fact, standing alone, is not sufficient to satisfy the *Lebron* inquiry. The Second Circuit failed to take the next step in the *Lebron* analysis: determining whether the Manhattan Borough President retained authority to nominate a majority of MNN's directors. But nowhere does the Amended

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[10] Justice O'Connor, in dissent, would not have addressed whether Amtrak was a part of the government because the question raised in the petition for certiorari was on the narrower state action question as to the challenged conduct. *Id.* at 400 (O'Connor, J., dissenting). Justice O'Connor would have held that the conduct at issue was "a matter of private business judgment and not of Government coercion" and would have affirmed the dismissal of the action based on the failure of the facts to satisfy the state action tests. *Id.*

Complaint allege that the government *ever* had authority to appoint a majority of MNN's directors. MNN is not a state actor (or part of the government) under *Lebron*.

B. MNN Does not Perform a Traditional and Exclusive Government Function, so it is not a State Actor Under the "Public Function" Test

The "public function" test considers whether a private entity is performing a function *traditionally and exclusively* performed by government. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 831, 842 (1982); *Flagg Bros.*, 436 U.S. at 158-60. This Court has cautioned that the "public function" inquiry, by design, has "carefully confined bound[aries]" because, "[w]hile many functions have been traditionally performed by governments, ***very few have been 'exclusively reserved to the State***.'" *Flagg Bros.*, 436 U.S. at 159, 163 (emphasis added) (examining prior "public function" cases and noting that "their scope is carefully defined" and that what those cases "have in common [is] the feature of exclusivity," such as "education, fire and police protection, and tax collection"). The few functions this Court has found to meet the narrow application of the "public function" test include an election run by a private political party, *Terry v. Adams*, 345 U.S. 461, 468-70 (1953), operating a public park, *Evans v. Newton*, 382 U.S. 296, 302 (1953), and the exercise of peremptory challenges, which assists the government in the selection of juries, the "quintessential governmental body" (*Edmonson*, 500 U.S. at 624; *Georgia v. McCollum*, 505 U.S. 42, 54 (1992)).

Recognizing the narrow confines of this inquiry, this Court has consistently rejected attempts to find state action under the public function test where the stringent criteria—*performing a traditional and exclusive government function*—are not met. For example, in *Jackson*, this Court held that Metropolitan Edison Co., a private corporation authorized to provide utilities by the state's award of a certificate of public convenience, was not a state actor for purposes of constitutional claims arising out of an alleged wrongful termination of utility services. 419 U.S. at 346-48. The Court held that, even though Metropolitan held a near monopoly on the provision of utilities, supplying utility services was not a function traditionally and exclusively performed by the State; and, indeed, courts had "rejected the contention that the furnishing of utility services is either a state function or a municipal duty." *Id.* at 353.

Similarly, in *Flagg Bros.*, this Court declined to find state action in a private storage facility's sale of belongings pursuant to a New York Uniform Commercial Code regulation permitting a warehouse owner to sell goods entrusted to their care (following a bailor's eviction from an apartment and deposit of the goods with the bailee) for nonpayment of warehousing fees. 436 U.S. at 153-54. The Court rejected the contention that New York had delegated to the private storage facility its "sovereign monopoly power over binding conflict resolution" and allowed the private storage facility to "execute a lien and thus perform a function which has traditionally been that of the sheriff." *Id.* at 155. Instead, the Court held that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." *Id.* at 161.

Finally, in *Rendell-Baker*, the Court considered whether a private school for children with behavioral issues, which received up to 90% of its funding from public sources and which was regulated by public authorities, was a constitutional state actor. 457 U.S. at 831-34. The Court observed that there could "be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry" and "[t]hat a private entity performs a function which serves the public does not make its acts state action." *Id.* at 841-42. The Court found the "public function" test was not met because providing education for students who could not be served by traditional public schools was not a task exclusive and traditional to government. *Id.* at 842; *see also San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544-45 (1987) (U.S. Olympic Committee did not perform a constitutional "public function" because "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function"); *Blum*, 457 U.S. at 1011-12 (provision of long-term nursing care not "'traditionally the exclusive prerogative of the State'") (quoting *Jackson*, 419 U.S. at 353); *Polk Cnty. v. Dodson*, 454 U.S. 312, 318-19 (1981) (public defender was not performing a "public function" because in "advancing the undivided interest of his client," it performs "essentially a private function, traditionally filled by retained counsel" (internal citation and quotation omitted)).

The allegations here fall far short of plausibly satisfying this demanding standard. The provision of cable television generally—or public access channels in particular—is not a function *traditionally* provided by government. But even if it was, it is certainly

not a function that is *exclusively* provided by the state. As a plurality of this Court recognized in *Denver Area*, the public access channel operator "is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner." 518 U.S. at 761; *see also Wilcher*, 498 F.3d at 519 (provision of public access television not a "public function" for purposes of constitutional claim); *see also ACM*, 56 F.3d at 113 ("[D]etermining what programs shall be shown on a cable television system is not traditionally within the exclusive province of government at any level."). Indeed, 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.

While the Majority below did not apply the "public function" test, Judge Lohier in his concurrence attempted to do so. Judge Lohier wrote that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Pet. App. 21a. But this analysis improperly assumes the antecedent and is a misapplication of the "public function" test.

First, the City has not delegated to MNN a *municipal obligation* such that MNN's actions can be considered state action. *Cf. West v. Atkins*, 487 U.S. 42, 47, 54-57 (1988) (where State was constitutionally obligated to provide medical treatment to inmates, delegation of this function to private physician satisfied "public function" test). Indeed, under the applicable regulations, control of the public access channels in Manhattan has never resided with the City. Pursuant to the New York state regulations, if the

municipality fails to designate a private nonprofit entity to operate the local public access channel, the operation of such channel does not fall to the City—it defaults to the *cable franchisee*. *See* 16 NYCRR § 895.4(c)(1); *cf. Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55-56 (1999) (Pennsylvania statutory scheme did not always require state to be involved in workers' compensation matters, so there could be no delegation of a traditional and exclusive governmental function); *Jackson*, 419 U.S. at 353 (observing that statutory scheme governing provision of utility service never required the state to provide such service in the first instance, such that state could not have delegated government function to private utility operator).

Moreover, this Court has only ever applied the "public function" analysis by looking at the specific function being performed by the private entity and considering whether that specific function is "an exclusive prerogative of the sovereign." *Flagg Bros.*, 436 U.S. at 160 (warehouse sale of private property pursuant to New York Uniform Commercial Code); *see also Jackson*, 419 U.S. at 351-53 (provision of utility services); *Rendell-Baker*, 457 U.S. at 842 (education of maladjusted students); *San Francisco Arts & Athletics*, 483 U.S. at 544-45 (coordination of Olympics competition); *Blum*, 457 U.S. at 1011-12 (provision of long-term nursing care); *Terry*, 345 U.S. at 468-70 (administering an election); *Evans*, 382 U.S. at 302 (operation of a public park); *Edmonson*, 500 U.S. at 624-25 (use of peremptory challenges to create a jury); *Brentwood*, 531 U.S. at 309-10 (Thomas, J., dissenting) (organization of interscholastic sports).

The concurrence below asserted that MNN's programming is not simply "entertainment" but rather "relates to political advocacy, cultural and community affairs, New York elections, religion — *in a word, democracy*." Pet. App. 20a (emphasis added). This characterization, however poetic, is irrelevant if MNN does not carry out "*traditional*" and "*exclusive*" government functions. *See Rendell-Baker*, 457 U.S. at 842 ("the relevant question is not simply whether a private group is serving a 'public function'" but whether the function is "'traditionally the exclusive prerogative of the State'") (quoting *Jackson*, 419 U.S. at 353). The concurrence's formulation of the "public function" test is a radical departure from the way this Court has traditionally applied the analysis.

C. There Are no Allegations That the City Compelled or Coerced the Challenged Conduct, and MNN is Therefore not a State Actor Under the "Compulsion" or "Coercive Power" Test

This Court has also utilized the "compulsion" or "coercive power" test to find state action "when [the state] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

The focus of the "compulsion" inquiry is the challenged conduct itself and whether the state coerced, compelled, or encouraged that specific conduct. Where such conduct by the state is absent, the test is not satisfied. *See, e.g.*, *Blum*, 457 U.S. at 1005 (decisions to discharge or transfer patients from nursing homes were made by physicians and nursing home administrators, not the State, which "does not render

[the state] *responsible*" for the challenged conduct) (emphasis in original); *Flagg Bros*., 436 U.S. at 165 (no state action even where statutory scheme "permits but does not compel" the challenged conduct, the threatened sale of bailor's goods); *Sullivan*, 526 U.S. at 52 (private insurers not subject to constitutional requirements where the state neither coerced nor encouraged the insurer's actions).

In this case, the Amended Complaint is devoid of any allegations that the City influenced, let alone encouraged, compelled or coerced, the disciplinary conduct Petitioners challenge. In fact, the Majority below conceded, as it must, that allegations of the City's involvement with MNN are limited only to the Manhattan Borough President's designation of MNN to run Manhattan's public access channels more than 25 years ago and the Manhattan Borough President's nomination of two of MNN's 13 board members. Pet. App. 8a, 14a-15a. These allegations do not come close to demonstrating influence, encouragement, or coercion of MNN's decision to take disciplinary action against the Respondents over twenty years later.

Finally, even though MNN is bound by New York's regulatory scheme governing public access television, it is well-established that the mere existence of a regulatory regime alone does not suffice to show that the challenged conduct was compelled or encouraged by the State. *See Blum*, 457 U.S. at 1008 (regulations involving level of care or transfer of patients, including specific forms and Medicaid requirements, do not "demonstrate that the State is responsible for the decision to discharge or transfer particular patients"); *Jackson*, 419 U.S. at 357 (regulations allowing termination of utility services "does not transmute a practice initiated by the utility and

approved by the commission into 'state action'" where the state "has not put its own weight on the side of the proposed practice by ordering it").

The facts alleged here simply do not warrant a finding of state action under a compulsion analysis. Indeed, the Second Circuit implicitly rejected any notion of state compulsion when it affirmed the dismissal of the City from this action.

D. MNN Does not act Jointly or Enjoy a Symbiotic Relationship With the Government

This Court has applied a state action test that looks for "joint action," a "close nexus," or a "symbiotic relationship" between the private entity and the government. This test analyzes whether the private entity operates as a "willful participant in joint activity with the State or its agents." *Brentwood*, 531 U.S. at 296. The critical factor in this analysis is the degree of coordination with (and involvement by) the state.

The Court used this analysis to find a privately-owned restaurant to be a state actor in *Burton v. Wilmington Parking Authority*, 365 U.S. 715. In *Burton*, the restaurant, which openly discriminated against African Americans, leased its space from a municipal agency, which also owned and operated an adjacent parking garage. *Id.* at 716. The Court noted that the restaurant was on publicly-owned land, the municipal agency took care of upkeep and maintenance of the restaurant facility, and the restaurant's discriminatory practices provided a direct financial benefit to the parking garage. *See id.* at 723-25. On these facts, the Court held that "[t]he

State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." *Id.* at 725; *see also Lugar*, 457 U.S. at 941 ("a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment").

The facts of *Burton* and *Lugar* are unique, and "symbiotic relationship" inquiries have proven difficult to satisfy. Certainly "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the [Constitution]." *Sullivan*, 526 U.S. at 52 (quoting *Jackson*, 419 U.S. at 350); *see also Blum*, 457 U.S. at 1010-12 (rejecting argument that extensive subsidization and regulation of discharge and transfer of Medicaid patients causes private entity and government to be "joint participant" in challenged conduct).

In *Jackson*, the Court explained that even a "heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory" was insufficient to demonstrate a "symbiotic relationship" with the state such that the private utility's decision to terminate utility service could be deemed state action. 419 U.S. at 357-59. Similarly, in *Rendell-Baker*, the Court acknowledged that the education system at issue was heavily regulated and the private school at issue relied upon public funds for nearly all of its income, but held:

> The school, like the nursing homes [at issue in *Blum*], is not fundamentally differ-

> ent from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Id. at 840-41; *Sullivan*, 526 U.S. at 52-54 (creation and regulation of remedial system for insurers did not transform "judgments made by private parties" into state action).

Here, the minimal connection between MNN and the City falls far short of even the funding and regulatory regime the Court has consistently found insufficient to constitute state action.

E. MNN is not Pervasively Entwined with the Government to Satisfy the Test Articulated in *Brentwood*

In *Brentwood*, this Court's most recent discussion of state action, this Court addressed whether a nominally private interscholastic athletic association was a state actor. *See* 531 U.S. at 290. The association had been "incorporated to regulate interscholastic athletic competition among public and private secondary schools" and to enforce its rules against member schools. *Id.* A private member high school sued the association under Section 1983 when the association disciplined the school for violating a recruiting rule. *See id.* at 292-93.

The Court held that the athletic association was a state actor, applying a test that examined its "entwinement" with the state. The Court considered

whether "the relevant facts show pervasive entwinement to the point of largely overlapping identity." *Id.* at 303.[11] A divided Court held that, where: the association was comprised mostly of public schools, was mostly publicly funded, run by public school officials, and its staff members were eligible for state retirement benefits, the "nominally private character of the Association [wa]s overborne by the ***pervasive entwinement*** of public institutions and public officials in its composition and workings," sufficient to find state action. *Id.* at 298 (emphasis added).

The *Brentwood* majority considered a number of factors in determining that the "entwinement" was "pervasive." *Id.* at 298. First, nearly all of the member schools in the association were public schools. *See id.* And, because each school was represented in the association by its principal or faculty member (each of whom were eligible to vote on matters of governance, rules, and leadership), the association effectively was controlled by public school officials (*i.e.*, state actors). *See id.* The Court noted:

> There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical

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[11] The *Brentwood* majority relied, in part, on *Evans* for its entwinement analysis. 531 U.S. at 296-97, 301 (citing *Evans*, 382 U.S. 296). In *Evans*, this Court found state action where a park with private trustees and the state were literally "entwined in the management or control of the park"—*i.e.*, where the state "swept, manicured, watered, patrolled, and maintained" the park. 382 U.S. at 301.

> terms. Only the 16% minority of private school memberships prevents this entwinement of the Association and the public school system from being total and their identities totally indistinguishable.

Id. at 300. Furthermore, the Tennessee Board of Education provided that its members would sit, *ex officio*, as members of the association's board. *See id.* Even the ministerial employees of the association were "treated as state employees to the extent of being eligible for membership in the state retirement system." *Id.* Finally, the Tennessee Board of Education reviewed and specifically approved the association's rules, including the challenged recruiting rule, and reserved the right to make future changes. *See id.* at 292-93.

Justice Thomas, joined by Justices Rehnquist, Scalia, and Kennedy, dissented and expressed concern that the "entwinement" inquiry was a "new theory" that "extends state-action doctrine beyond its permissible limits [and] also encroaches upon the realm of individual freedom that the doctrine was meant to protect." *Id.* at 305, 312. The *Brentwood* dissent noted that the majority did not "define 'entwinement,' and the meaning of the term is not altogether clear" from the decision. *Id.* at 312. The *Brentwood* dissent noted that "the scope of [the majority's] holding is unclear" and expressed hope that "the majority's fact-specific analysis will have little bearing beyond this case." *Id.* at 314.[12]

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[12] In the wake of *Brentwood*, Circuit courts have interpreted the "entwinement" test narrowly, often as a recasting of the existing state action tests rather than a brand new test.

The *Brentwood* dissent also applied each of this Court's established state action tests and determined that the Association *would not* have qualified as a state actor under: (i) the "public function" test, because the "organization of interscholastic sports is neither a traditional nor an exclusive public function of the States" (*id.* at 309); (ii) *Lebron*, because the association was not "created and controlled by the government for the purpose of fulfilling a government objective" (*id.* at 310 (citing *Lebron*, 513 U.S. at

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For example, courts have focused on the extent of government control of the entity, whether through control of an entity's board (*Lebron* analysis) or through the state's involvement in operational decision making ("coercive power" or "joint action" analyses). *See, e.g.*, *P.R.B.A. Corp. v. HMS Host Toll Rds., Inc.*, 808 F.3d 221, 225-26 (3d Cir. 2015) (observing that courts "must carefully analyze the entire record to determine whether [New Jersey highway authorities] were so pervasively entwined in the structure and management of" private lessee of service plazas on public highway and holding that there was no "pervasive entwinement" where there was "no personnel overlap between the [municipality] and [private entity]," "no specific [government] involvement … in [the challenged] decision," and no "actual involvement of either entity in the management or control of the other" despite profit sharing arrangement in leases); *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 269 (2d Cir. 2014) (entwinement test considers, in addition to source of funding, whether town "appoints any portion of [private ambulance corps's] board or has any say in [private entity's] management or personnel decisions" or "played any role in the [challenged] disciplinary process"); *Hughes v. Region VII Area Agency On Aging*, 542 F.3d 169, 178-79 (6th Cir. 2008) (entwinement inquiry considered extent to which government was entwined in the management and control of nonprofit elder care facilitator); *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 28 (1st Cir. 2002) (examining the extent of state regulation of school, public funding of school, how many public officials run the school to determine that "there is no entwinement").

394)); (iii) the "coercive power" test, because the State had not promulgated the regulations of those sports nor had it "encouraged or coerced the [association] in enforcing its recruiting rule [at issue]" (*id.* at 310-11); or (iv) the "symbiotic relationship" or "joint action" test, because a mere "fiscal relationship with the State is not different from that of many contractors performing services for the government" and there was no evidence that "the State profits from the [association's] decision to enforce its recruiting rule." *Id.* at 311 (quoting *Rendell-Baker*, 457 U.S. at 843).

Here, the allegations regarding MNN do not come close to supporting a plausible finding of state action through the "pervasive entwinement of public institutions and public officials." *Brentwood*, 531 U.S. at 298. Indeed, the only arguable "entwinement" occurred *more than 25 years ago* when the Manhattan Borough President designated MNN to operate Manhattan's public access channels. This is a mere historical artifact. Notably, the *Brentwood* Court emphasized that the important state of affairs to consider was the *then-current* relationship between the State and the private association. The Court noted that, even though in 1996 the State Board dropped the rule designating the association as the regulator of interscholastic high school sports in the state, the Association continued to enforce the same pre-1996 rules and the State continued to allow students to satisfy physical education requirements through activities with the Association. *See id.* at 300-02. The Court agreed with the district court in *Brentwood* "because of 'custom and practice,' 'the conduct of the parties has not materially changed' since 1996, 'the connections between [the association]

and the State [being] still pervasive and entwined.'" *Id.* at 301-02 (citation omitted). Of paramount importance to the Court was the "practical certainty … that public officials will control operation of the Association under its bylaws." *Id.* at 301 n.4.

Here, the Manhattan Borough President's right to nominate two of MNN's 13 board members cannot possibly give rise to the "practical certainty … that public officials will control operation of [MNN] under its bylaws." *Id.* The Amended Complaint included no allegations of any other form of entwinement. And, as both the district court and the Second Circuit correctly found, the City is not alleged to have played any role whatsoever in MNN's day-to-day management or operations. MNN is simply not a state actor under the *Brentwood* "entwinement" test.

III. THE SECOND CIRCUIT'S DECISION IS A RADICAL EXPANSION OF THE STATE ACTION DOCTRINE WITH POTENTIALLY FAR-REACHING CONSEQUENCES

The Second Circuit's ruling threatens to blur the line between governmental and private conduct, leaving courts with little guidance in determining the extent to which private entities—especially those in new and changing media landscapes—are subject to the First Amendment. Without attentive application of the state action analysis, the protections this Court has carefully developed for private conduct over the course of decades are at risk of erosion.

A. Left Undisturbed, the Second Circuit's Ruling Would Establish an Amorphous, Unworkable State Action Inquiry

The Second Circuit's determination that MNN is a state actor—at the pleading stage, no less—leaves little guidance for courts. The bounds of the inquiry are undefined: Is the threshold state action determination no longer required? Is designation by a government official or significant government regulation sufficient to find state action? Is the operation of a forum for public discourse (coupled with some level of regulation) sufficient to find state action? The holding raises other questions as well: Is state action in the "I know it when I see it" category? Can a plaintiff get past a motion to dismiss based on scant allegations of government nexus? These are questions of great concern.

The fact that an electronic forum may be analogous in some respects to a traditional public forum and is subject to some form of government regulation should not render it a *constitutional* public forum. As noted above, many social media sites share characteristics with public fora, but they are not *constitutional* public fora. For example, Twitter, Facebook, YouTube, call-in radio programming, and television shows (particularly public interest shows) share qualities with certain traditional public fora, but they are not, and should not be considered, *constitutional* public fora. This is precisely why it is necessary to perform the state action analysis first, as a threshold matter, prior to reaching the question of whether something is a constitutional public forum. Without rigorous

adherence to the state action analysis, the longstanding constitutional protections for private entities will be lost.

For example, if MNN's minimal nexus to the government is sufficient to find state action, then entities such as Time Warner, Facebook, Twitter, and National Public Radio ("**NPR**")—all of which are subject to *some* level of governmental regulation—should be concerned. Although the national public broadcasting system was created by virtue of the Public Broadcasting Act of 1967 (47 U.S.C. § 396 *et seq.*), which enabled organizations like NPR to provide their services, many "public" radio stations are not public at all. Many "public" radio stations are private, often nonprofit, entities that support their mission through listener and corporate donations.[13]

The Second Circuit decision likewise calls into question prior decisions as to whether these private entities should be treated as state actors either because they were created or supported by act of government, are heavily regulated, or bear a resemblance to state-owned broadcasters. *See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 564-77 (S.D.N.Y. 2018) (President Trump's Twitter account, but not Twitter itself, was public forum); *Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 WL 1471939, at *5-9 (N.D. Cal. Mar. 26, 2018) (YouTube and Google not state actors); *Shulman v. Facebook.com*, No. 17-cv-00764, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (Facebook not a constitutional state actor); *Abu-Jamal v.*

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[13] *See* American Public Media, *Organizational Structure*, https://www.americanpublicmedia.org/about/org-structure (last visited Dec. 3, 2018).

Nat'l Pub. Radio, No. 96-cv-0594, 1997 WL 527349, at *4 (D.D.C. Aug. 21, 1997), *aff'd*, 159 F.3d 635 (D.C. Cir. 1998) ("NPR … is not a government instrumentality, and is not a state actor for First Amendment purposes.").

B. The Second Circuit's Ruling may Have Additional Ramifications

This Court has carefully circumscribed the state action analysis because calling a private entity a state actor has significant consequences that should not be taken lightly. Justice Alito raised some of these concerns in his concurring opinion in *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225 (2015), where the Court explored the implications of Amtrak being a "governmental entity" (for purposes of the delegation doctrine). *See id.* at 1231-34. For example, while Amtrak may be a government actor because of pervasive government control, Amtrak's officers have not taken an oath of office, as government officials do. *See id.* at 1235 (Alito, J., concurring). Amtrak's board composition also creates Appointments Clause concerns. *See id.* at 1238. Private entities are simply not structured in a way to address, account for, and accommodate broader constitutional concerns. *See id.* at 1234, 1240 ("while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes [because Amtrak was "created by the government, is controlled by the government, and operates for the government's benefit"], it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution").

Moreover, as a result of the decision below, the rules, policies and actions of a private operator of a

public access channel will now be subject to the expense and distraction of recurring federal judicial review. In addition to the costly nature of defending claims in federal court, constitutional claims carry with them the threat of attorneys' fees for the prevailing party. 42 U.S.C. § 1988(b).

Allowing the Second Circuit's decision to stand would also upset the very purpose of public access television, diverting scarce resources from operations to defending potential federal lawsuits and creating new bureaucracies.[14] Operators could very likely be forced to defend in court basic administrative decisions such as scheduling changes, assigning a producer a less-than-ideal time slot, and issues that arise in the day-to-day operation of an access center. Where resources are tight, such litigation (along with compliance concerns) may prove exceedingly costly and difficult for nonprofits such as MNN. These costs would necessarily divert resources from other community programs that public access centers perform, such as educational classes and workshops that teach people valuable media skills.

Critically, reversing the Second Circuit's holding would not deprive the Respondents of a remedy. The PSC hears claims relating to the operation of public access in New York State, including claims by allegedly aggrieved producers. *See Assoc. of Cable Access*

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[14] The Second Circuit's holding calls into question whether MNN will be subject to state sunshine and open meetings laws, or whether it will need to add administrators to manage requests under the Freedom of Information Act (5 U.S.C. § 552 *et seq*.) and its state corollaries. While a city, county, or state routinely deal with such consequences, they are of great significance to a private nonprofit company that lacks the necessary budget and infrastructure to address them.

Producers v. Pub. Serv. Comm'n, 1 A.D.3d 761, 762-64 (N.Y. App. Div. 2003) (citing PSC mechanism for complaints regarding public access); *see also* 16 NYCRR § 895.4(f)(2) (allowing interested parties to "seek a ruling from the [PSC] concerning the applicability or implementation of any provision of this section or any provision of a franchise concerning PEG access upon the filing of a petition"). This type of localism inherent in the public access regime was recognized by—and critical to the decision reached by—Justice Breyer in the *Denver Area* plurality opinion. *Denver Area*, 518 U.S. at 762. The Majority's one-size-fits-all standard eviscerates locally accountable bodies that are best placed to adjudicate disputes or grievances.

Allowing the Second Circuit decision to stand would impose tremendous logistical and administrative burdens upon MNN while circumventing the key local processes this Court has considered essential for the functioning of public access television.

CONCLUSION

The judgment of the court of appeals should be reversed as to Petitioners, and left undisturbed as to the affirmance of the dismissal of the City.

Respectfully submitted,

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