No. 17-1702

In the
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, et al.,
Petitioners,

v.

DEEDEE HALLECK, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND TECHFREEDOM IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in rejecting this Court's state actor tests and instead creating a per se rule that private operators of public access channels are state actors subject to constitutional liability.

2. Whether the Second Circuit erred in holding—contrary to the Sixth and D.C. Circuits—that private entities operating public access television stations are state actors for constitutional purposes where the state has no control over the private entity's board or operations.

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INTEREST OF AMICI CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF has long defended the freedoms of speech and association, including most recently before this Court in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

PLF's interest in this case stems from its concern that the Second Circuit's decision would radically curtail private property rights and freedom of expression by imposing constitutional restraints that are intended to limit the scope of the government onto private individuals.

Founded in 2010, TechFreedom is a nonprofit, non-partisan think tank dedicated to educating policymakers, the media and the public about technology policy. TechFreedom advocates for policies that promote civil liberties, dynamism, entrepreneurship, and permissionless innovation in technology and telecommunications. TechFreedom

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

does so through publishing white papers, holding conferences and briefings, engaging with policymakers, filing briefs, amicus briefs and comments in regulatory proceedings across numerous government agencies.

At the core of TechFreedom's work is protecting the First Amendment. The Second Circuit's expansion of the "public forum" doctrine is unconstitutional and would actually reduce diversity of voices in American discourse. In an age of rapid technological change, we must not throw away the 200-year-old concept of a separation between the rights and responsibilities of private entities and government actors. The First Amendment applies only to the former and attempts to force governmental obligations on private actors will entrench incumbent companies and stifle the innovation that has resulted in such rapid and positive change in the Internet ecosystem.

INTRODUCTION AND SUMMARY OF ARGUMENT

This nation's long-standing respect for private enterprise, individual freedom, and private property ownership has led to the most dynamic engines for growth the world has ever known. When the sphere of governmental authority is small and the room for private ingenuity and liberty is expansive, there is room for human flourishing and for unparalleled achievement. Nowhere can this be seen more clearly than with the growth of technology which has transformed the way that human beings interact. Today, individuals come together to exchange ideas

and debate about everything from celebrity gossip to the foundational principles of the American Republic in spaces that are owned and operated by private parties. From television networks to Internet social media sites, these privately created venues contribute to a dynamic and robust marketplace of ideas. But individuals dissatisfied with private control of these forums seek to leverage government power to regulate them out of existence or even to take them over.

This case involves one such private forum—a television channel. While cable television networks are regulated by an extensive and burdensome web of federal, state, and city regulations, the network nevertheless retains constitutional rights regarding the content that it broadcasts on its channels. But according to the Second Circuit because a particular television channel operates for the public good and encourages the exchange of ideas like a traditional public forum its operation must be bound by the limitations of the United States Constitution and the private entity in charge of making programming decisions cannot discriminate against any content type or viewpoint. The Second Circuit's decision is so broad that under its reasoning large swathes of private property can be transformed into public property, and many private parties could be restricted and constrained as if they were state actors. If that decision is allowed to stand it will have the consequence of stifling competition and diversity in the marketplace of ideas.

The Second Circuit's decision is deeply flawed in at least four respects. First, private property does not become a public forum just because of its resemblance to public fora. Second, television networks and other private communications networks are not merely conduits of the speech of others but retain discreet First Amendment rights. Third, the use of private property for the public good does not result in the property being stripped of its private character. Finally, scarcity of channels of communication cannot justify increasingly regulating the use of private property and does not lead to the transformation of that property into a public forum. This Court must reverse the Second Circuit's decision.

ARGUMENT

I

THE SECOND CIRCUIT'S OVERBROAD RULING RISKS TRANSFORMING VAST SWATHES OF PRIVATE PROPERTY INTO PUBLIC FORA

The principle that a private corporation does not become a governmental actor merely because it has been granted permission or authority by the government is one that has deep roots in our nation's history and legal tradition. Nearly 200 years ago in the seminal case of *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629 (1819), the Supreme Court considered whether the charter of Dartmouth College could be amended by the state of New Hampshire. New Hampshire argued that "the act of

incorporation [was] a grant of political power" that "create[d] a civil institution, to be employed in the administration of the government." *Id.* at 629. Chief Justice John Marshall rejected that argument, emphasizing that the grant or charter of incorporation does not "change[] the character of the institution, or transfers to the government any new power over it." *Id.* at 638. Even though Dartmouth College had been established in furtherance of public ends and had been given its existence by the colonial government of New Hampshire, it still retained its private character and interest. *See* Adam Winkler, *We the Corporations* 145–164 (2018) (describing the *Dartmouth College* decision and its impact on the Supreme Court's treatment of corporations). Justice Marshall's conclusion that the government's power to regulate a corporation was limited "resonated with the claims colonists made on the limits on parliamentary power during the debates over independence" and was consistent with "the rhetoric of the Revolution." Winkler at 161.

"Careful adherence" to the distinction between private and governmental entities is vital because it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). This Court has diligently maintained that distinction, *see Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982) ("[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State"), especially in the context of the First Amendment where "governmental action, ordinarily does not itself throw into constitutional doubt the

decisions of private citizens to permit, or to restrict, speech . . . .” *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 737 (1996).

This Court’s precedent allows for two exceptions to the general principle that private actors do not become governmental actors even in the face of extensive regulatory oversight. First, there is a narrow carve-out for the “exercise by a private entity of powers traditionally exclusively reserved to the State.” *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). This power must be one that is “traditionally associated with sovereignty, such as eminent domain.” *Id.* at 353. This Court has emphasized that functions that are merely “affected with a public interest” or “clothed with a public use” do not qualify as “powers traditionally exclusively reserved to the State.” *Id.* at 352. “The range of government activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.” *Evans v. Newton*, 382 U.S. 296, 300 (1966).

Second, an exception exists for “when it can be said that the State is *responsible* for the specific conduct” at question. *Blum*, 457 U.S. at 1004 (emphasis in original). The state must, in other words, “exercise[] coercive power or . . . provide[] such significant encouragement, either overt or covert, that

the choice must in law be deemed to be that of the State." "Mere approval of or acquiescence in the initiatives of a private party is not sufficient[.]" *Id.* The Court has utilized a slew of different tests for the relevant inquiry such as the "public function test," the "nexus" test, the "state compulsion" test, and the "joint action test." *Lugar*, 457 U.S. at 939. These tests each have their own idiosyncrasies, but they all boil down to the same foundational question—is the private actor in question so heavily controlled or compelled to act by a state actor that its actions must be seen as an extension of the state itself?

Under any of these existing tests—none of which were applied by the Second Circuit—the Manhattan Neighborhood Network (MNN) is likely not a state actor. As Judge Jacobs in his separate opinion concurring in part and dissenting in part explained, there is no state compulsion because the City had no direct control over MNN's editorial decision making. *Halleck v. Manhattan Cmty. Access Corp.,* 882 F.3d 300, 310 (2d Cir. 2018) (Jacobs J., concurring in part and dissenting in part). Similarly, the two City appointed members of the MNN board did not exercise the kind of control needed to establish joint action. *Id.; cf. Wilcher v. City of Akron*, 498 F.3d 516, 522 (6th Cir. 2007) (finding that the state was liable when it had "reserved express power to review and overrule decisions . . . governing the public access channel."). The miniscule amount of control that the government has over MNN's day-to-day operations stands in stark contrast to other cases where a court determined that a private entity was a state actor. For

instance, *Evans*, 382 U.S. at 299, concerned a park which was deeded to the city, used by the city for city functions, and maintained by the city and therefore had become public property. Finally, MNN was not performing a function that was a "traditional and exclusive public function." *Halleck*, 882 F.3d at 311. As the Sixth Circuit correctly concluded in a similar case, "TV service is not a traditional service of local government" and the fact that public access channels are managed by the government in some communities does not transform the service into "a power reserved exclusively to the state." *Wilcher*, 498 F.3d at 519. That should have settled the matter; the case should be remanded to allow the Second Circuit to apply the correct tests in the first instance.

Determining state actor status requires closely "sifting facts and weighting circumstances." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). It is certainly easy to envision a public access television network that is a state actor. For instance, if a government entity runs the network, or if the government exercises direct control and supervision over the content that the network displays. Although the facts of this case do not appear to support the conclusion that MNN is a state actor, the Second Circuit could have written a narrow opinion applying the tests set forth above that would leave open the door for state actor status in a closer case.

The Second Circuit's ruling was anything but narrow. Instead, the court held that the public access channel was a public forum because of its resemblance

to traditional public fora. *See* Pet. App. 13a ("A public access channel is the electronic version of the public square."). Because MNN was required to operate the channel, this led to the conclusion that it was a state actor. Unfortunately, the Second Circuit's overbroad decision risks transforming many private actors into state actors and large swathes of property into public fora. The Second Circuit's decision lacks any meaningful limiting principle and would be disastrous for freedom of speech if allowed to stand.

Specifically, the decision below is deeply flawed in at least four respects. First, mere resemblance to government-run public fora does not create a public forum. Second, public access channels and other content providers are not merely conduits for the speech of others. Third, use of private property for the public good does not strip it of its private character. Fourth, scarcity does not justify the transformation of private property into a public forum.

A. Mere Resemblance to a Public Forum Cannot Transform Private Property

For the Second Circuit, all that was required to declare that public access channels are public fora was that the channels resemble traditional "soap box[es]" found in public streets and parks. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996) (Kennedy J., concurring). But if mere similitude to a public forum creates a public forum, then a broad swath of traditionally private property will be converted into public fora. A newspaper's opinion section or online comment forum

can allow for the airing of different and competing perspectives. A shopping mall can allow competing brands to have a storefront. An online content provider such as Facebook or YouTube can allow users to create and share diverse content. Each of these fora in some ways resemble a "soap box" in a traditional public forum. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (describing the Internet as "the modern public square"). Under the reasoning of the Second Circuit, all of these can be turned into public fora.

Fortunately, that is not the law of this Court. Under this Court's long-standing doctrine, it is only "*government property* that has traditionally been available for public expression" that is subject to the full rigors of the First Amendment. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (emphasis added). The public right of access to government-owned and controlled property flows from the fact that such property has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Access to such property that has been held in the public trust is "part of the privileges, immunities, rights, and liberties of citizens." *Id.* The same cannot be said for privately held property no matter how closely it may resemble a public square.

To the contrary, the idea that private property becomes a public forum if it approximates a public forum was wisely rejected by this Court. In *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 309 (1968), *abrogated by Hudgens v. N. L. R. B.*, 424 U.S. 507 (1976), this Court engaged in an ill-fated effort to expand the scope of a public forum onto private property. When the owners of a store in a shopping mall sued to enjoin union picketers from accessing their property, this Court held that "the shopping center premises were not privately owned but instead constituted the business area of a municipality" because they were similar in nature to "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights." *Id.* at 315. A few years later, this Court wisely reversed course and emphasized that property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972). *See also Int'l Soc. For Krishna Consciousness*, 505 U.S. at 681 (emphasizing that the similarities between government and private fora was "irrelevant to *public* fora analysis").

The Second Circuit's decision is an invitation to return to the long-repudiated *Logan Valley* doctrine. This Court should reject that invitation. Transforming private property into public property would have a perverse impact on the marketplace of ideas. Such a rule would be especially burdensome to private property owners who create spaces for the expression

of a panoply of views. Social media entities in particular have staked their businesses on creating open platforms for the airing of diverse views. Under the Second Circuit's reasoning, social media platforms could face civil liability whenever they impose any kind of content restrictions, wholly upending the state of the law. *See Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 456 (E.D. Pa. 1996) (an ISP is not a state actor); *see also Green v. Am. Online, Inc.*, 318 F.3d 465, 472 (3d Cir. 2003) (same); *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (YouTube is not a public forum); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631–32 (D. Del. 2007) (a search engine is neither a state actor nor a public forum). Concretely, many websites would rather disable comment functionality entirely than have to justify comment moderation under the rigorous standards of the First Amendment.

Applying the public forum doctrine to privately created fora would paradoxically inhibit speech by encouraging the proprietor of the forum to close it entirely rather than risk First Amendment liability. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983) (observing that a judicial attempt to make school mailboxes into public fora "would invite schools to close their mail systems to all but school personnel."). A precedent that private property can become a public forum would therefore have the result of limiting the number of private entities that risk putting themselves in a position to be designated a public forum. That is the lesson of a

close historical precedent: the FCC's Fairness Doctrine.

The Fairness Doctrine was an FCC. rule that "required broadcast media licensees (1) 'to provide coverage of vitally important controversial issues of interest in the community served by the licensees' and (2) 'to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.'" *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 655 (D.C. Cir. 1989) (quoting *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees,* 102 F.C.C.2d 143, 146 (1985)). In practice, the arbiters of what constituted "contrasting viewpoints" and "reasonable opportunities" were F.C.C. bureaucrats and judges. And when either disagreed with a licensee's belief that the right voices had been presented, those licensees faced penalties of fines or even a loss of their license entirely. *See, e.g.*, *Brandywine-Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16, 63 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) ("The Federal Communications Commission has subjected Brandywine to the supreme penalty: it may no longer operate as a radio broadcast station.").

When the Fairness Doctrine was in effect, broadcasters "[came] under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues." *Id.* at 78. The result was that individual broadcast stations felt obligated to "decrease the number of issues [they] discussed, or to decrease the intensity of [their] presentation." *Id.* at 70.

Imposing First Amendment public forum doctrine on private platforms risks a similar effect. While proponents may hope that such a rule would only "eliminate bias," individual platforms may instead impose much stricter limitations on *all* speakers, so as to reduce the risk of any one speaker claiming "viewpoint discrimination." This lesson was learned with respect to the Fairness Doctrine, an approach that was rejected by bipartisan consensus. A similar attempt at mandating "fairness" should not be imposed on private broadcasters now through judicial means. "To argue that a more effective press requires a more regulated press flies in the face of what history has taught us about the values and purposes of protecting the individual's freedom of speech." *Id.* at 79.

The risk of censorship is especially severe in the context of social media organizations. If social media entities are required to choose between allowing Nazi hate speech, videos depicting animal cruelty, or simulated virtual child porn as the First Amendment requires the government to allow[2], or engaging in an aggressive crack-down on speech, then these organizations are likely to restrict speech in order to avoid creating a public forum in the first place.

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[2] *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (Nazi march); *United States v. Stevens*, 559 U.S. 460 (2010) (snuff and crush films); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (virtual child porn).

B. Private Entities Do Not Become State Actors Merely Because They Channel Individual Speech

The Second Circuit also relied implicitly on Justice Kennedy's argument that since a government entity granted the franchise and required the creation of public access channels, the channel operators were merely "conduits for the speech of others." *Denver Area*, 518 U.S. at 793 (Kennedy J., concurring). In other words, MNN could not control the message expressed on the public access channels because the speech was not its speech at all. This reasoning is contrary to this Court's precedent which emphasizes that cable operators are no less entitled to "decide . . . the ideas and beliefs deserving of expression, consideration, and adherence" and to be free from "governmental control over the content of messages expressed by private individuals." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). Cable programming operators exercise their First Amendment rights in innumerable ways such as "through original programming or by exercising editorial discretion over which stations or programs to include in [their] repertoire." *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986); *see also Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 117 (1973) ("[A] broadcast licensee has a large measure of journalistic freedom").

Federal law imposes some limits on the ability of cable programmers to exercise editorial control over public access channels. As several members of this

Court have noted, those limits are constitutionally suspect under the unconstitutional conditions doctrine and should be "subject to some form of heightened scrutiny." *Denver Area,* 518 U.S. at 821 (Thomas J., dissenting). But regardless of the continued validity of public access requirements, federal regulations do not bestow the public with constitutional access rights "that directly conflict with the constitutionally protected private speech rights of another person or entity." *Id.* at 820. As Justice Thomas explained in *Denver Area*, "[j]ust because the Court has apparently accepted, for now, the proposition that the Constitution permits some degree of forced speech in the cable context does not mean that the beneficiaries of a Government-imposed forced speech program enjoy additional First Amendment protections beyond those normally afforded to purely private speakers." *Id.* at 822. *See also Information Providers' Coalition for Defense of First Amendment v. F.C.C.*, 928 F.2d 866, 877 (9th Cir. 1991) ("[A] carrier is free under the Constitution to terminate service to dial-a-porn operators altogether").

Moreover, contrary to the Second Circuit's determination that public access providers are mere "conduits," public access providers can and do "exercise[] editorial discretion" as permitted by the First Amendment outside of federally imposed limits. For instance, one of the channels that MNN offers to the public is a partnership with Free Speech TV, a news network that offers a "progressive perspective on the news" and offers such left-leaning programing as Democracy Now! and Gay USA. *See* Free Speech TV,

Manhattan News Network Partners with Free Speech TV (Dec. 21, 2016)[3]. The result of this partnership is a richer diversity of programing. Taking the Second Circuit's reasoning to its logical conclusion, public access channels such as MNN would be unable to take steps to curate content or structure programming in furtherance of their mission to serve the public, let alone engage in similar partnerships such as that between MNN and Free Speech TV. A government actor required to carry public speech on equal terms could not host a network that treated progressive viewpoints more favorably than conservative viewpoints. Treating MNN as a state actor would therefore stifle diversity, harm the marketplace of ideas, and disserve the public. And this same logic could apply to any entity that could be described as "conduits for the speech of others," such as social media platforms. The Second Circuit's misguided decision would therefore wreak havoc on the ability of speech platforms to exercise editorial discretion or control.

Unfortunately, this Court's decision in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) contributed to the Second Circuit's confusion. In that case, the Court reiterated its determination that the First Amendment did not require property owners to relinquish private property rights, but suggested that the First Amendment did not prevent a state from forcing a large shopping mall to operate as a public forum when the property was open to the

[3] https://freespeech.org/press-releases/mnn-welcomes-free-speech-tv/.

public and private speech was unlikely to be attributed to the owner. *PruneYard* was wrong when it was decided, and has grown ever more dubious in light of this Court's increasing scrutiny of laws that compel speech. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018) (forced subsidy of union speech violates the free speech rights of nonmembers); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (law requiring crisis pregnancy centers to notify patients of the availability of publicly funded abortion was compelled speech and violated the First Amendment); *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (compelled assessment for mushroom promotion violated the First Amendment). The Court should therefore take this opportunity to repudiate the *PruneYard* doctrine and clarify that private property owners cannot be compelled by government fiat to allow their property to be used as a public forum. In any event, this case is distinguishable from *PruneYard* in that MNN exercised its editorial discretion to bar speech specifically because it objected to the content. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 580 (1995) (explaining that *PruneYard* "did not involve any concern that access to this area might affect the shopping center owner's exercise of his own right to speak" and that the owner in *PruneYard* "did not even allege that he objected to the content of the pamphlets") (internal citations omitted). If this Court does not wholly repudiate *PruneYard,* it should clarify that *PruneYard* is limited to cases where the content

of the speech in question is not contrary to the owner's right of self-expression.

C. The Fact That Public Access Channels Serve the Public Good Rather Than Generate Profit Should Not Turn Them into Public Fora

More than 20 years ago, the Second Circuit correctly concluded that a provider of leased access channels was not a state actor. *Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256 (2d Cir. 1999). In reaching the opposite conclusion in this case, the Second Circuit honed in on the distinction between nonprofit uses of property, which it saw as akin to government action, and for-profit uses, which are akin to private commerce. But this distinction is arbitrary and meaningless with regard to the reach of the First Amendment. In both instances cable operators are required to offer channels to the public that might have been used for another purpose and are subject to the same degree of government oversight. Nor is the presence or absence of a profit motive constitutionally significant. For-profit companies are "not require[d] . . . to pursue profit at the expense of everything else, and many do not do so." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014). For-profit organizations "support a wide variety of charitable causes . . . to further humanitarian and other altruistic objectives." *Id.* Owners of a for-profit are not required to sacrifice constitutional rights such as the right to freedom of speech and private property if they choose to pursue

the public good. Similarly, a private property owner can open his property for both paid and unpaid uses without relinquishing private property rights. *See Soderholm v. Chicago Nat. League Ball Club, Inc.*, 587 N.E.2d 517, 520 (Ill. App. 1992) (holding that "mere permission to use land does not ripen into a prescriptive right regardless of the length of time that such enjoyment is permitted"). For instance, the owner of a concert venue might allow artists to perform there for a fee, but also allow a charitable benefit concert to use the space without cost. This Court should clarify that the nonprofit use of property, such as providing public access channels, does not transform the property into a public forum.

D. Scarcity Cannot Justify the Transformation of Private Property into a Public Forum

An alternative rationale for the Second Circuit's ruling is the claim that public access networks are a limited resource and that therefore scarcity requires opening up these fora to the public. This Court has at times embraced the argument that scarcity can justify government regulations that guarantee public access. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). And in limited contexts, such as with a true government-granted monopoly, scarcity might justify greater government intervention. But there are several significant problems with that argument in this case.

First, the scarcity rationale in *Red Lion* was "dubious from [it]s infancy," *Denver Area*, 518 U.S. at 813 (Thomas J., dissenting); *see also Columbia Broad.*

Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94, 155 (1973) (Douglas J., concurring) (arguing that scarcity or the desire for a balanced perspective "was no reason to put the saddle of the federal bureaucracy on the backs of publishers"), is inapplicable to cable television, *Turner*, 512 U.S. at 622, and has become obsolete in light of other technological developments. This Court denied cable operators full protection of the First Amendment in *Turner*, only because of the "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators . . . ." 512 U.S. at 661. This supposed "gatekeeper" power over the content viewed by Americans depended on two factors: First, cable providers controlled very nearly 100% of the market for Multichannel Video Programming Distribution in data then available to the Court. This monopoly power disappeared almost immediately with the rise of satellite television. According to the most recent data from the Federal Communications Commission, at the end of 2015, cable operators had just 53.1% of the MVPD market and 99% of Americans had access to three television providers (satellite or cable). Federal Communications Commission, 18th Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, ¶¶ 2, 21 & Table III.A.2. These statistics dramatically *overstate* the continuing power of cable operators, both because they are now three years old, and cable's market share has declined steadily for years, and also because the percentage of Americans subscribing to *any* television service has also declined. Many Americans have simply "cut the cord" to television

services entirely. In the fall of 2018 alone, more than one million cable and satellite TV subscribers cancelled their subscriptions, largely because of the greater availability of online options. *See* Mike Snider, *Cord cutting accelerates as pay TV loses 1 million customers in largest-ever quarterly loss*, USA Today (Nov. 7, 2018)[4].

The second factor critical to *Turner* has also disappeared: "When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Turner*, 512 U.S. at 656. But today, even those who do subscribe to cable (or satellite) service, can easily access video content online just as easily. For instance, the video at the heart of this litigation can be accessed by any member of the public on YouTube[5]. And Comcast, the nation's largest cable company, allows its subscribers to access YouTube content through an app presented alongside its own content in the Xfinity user interface. *See* Comcast, YouTube App on Xfinity X1 Overview[6]. There is simply no longer the need to treat cable (or

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[4] https://www.usatoday.com/story/tech/talkingtech/2018/11/07/cord-cutting-accelerates-1-m-customers-dropped-pay-tv-last-quarter/1919471002/

[5] The 1% Visits El Barrio; Whose Community?, YouTube (July 29, 2012) https://www.youtube.com/watch?v=QEbMTGEQ1xc.

[6] https://www.xfinity.com/support/articles/x1-youtube-app-overview (last visited Dec. 5, 2018).

broadcast) television as a scarce resource that justifies government intervention and oversight.

Finally, the Second Circuit's decision goes far further than the Supreme Court did in *Red Lion*. There, the Court found that federal regulations requiring community access did not violate the First Amendment. Here, the Second Circuit found that such public access requirements were constitutionally *required* by virtue of the nature of the forum. The implications of that extension of *Red Lion* are stark; any owner of a scarce resource can now be conscripted into government service even without any express federal action, and even when the government ownership conflicts with the owner's First Amendment rights. *See Denver Area*, 518 U.S. at 820 (Thomas J., dissenting) ("[T]he Court has not recognized, as entitled to full constitutional protection, statutorily created speech rights that directly conflict with the constitutionally protected private speech rights of another person or entity."). This Court must reject the Second Circuit's faulty decision.

CONCLUSION

This Court should reverse the Second Circuit and find that MNN is not a state actor.

DATED: December, 2018.

Respectfully submitted,

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