No. 17-1702

# In The
# Supreme Court of the United States

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

*Petitioners,*

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF THE NEW YORK COUNTY LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

# TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

RULES



OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## INTEREST OF *AMICUS CURIAE*[1]

The New York County Lawyers Association ("NYCLA") is a not-for-profit membership organization committed to applying their knowledge and experience in the field of law to the promotion of the public good and ensuring access to justice for all. The Civil Rights and Liberties Committee of the New York County Lawyers Association produces comments and reports on local, state and national issues relating to constitutional rights. Both the NYCLA and its Civil Rights and Liberties Committee have a particular interest in government actions and the constitutional rights of individuals in the borough of Manhattan—as Manhattan is simply the municipal corporation geographically bound by, and coterminous with, New York County.

Founded in 1908, the New York County Lawyers Association has historically been one of the largest and most influential county bar associations in the country. At the time of its founding, the only existing bar association in Manhattan precluded some lawyers from membership by virtue of their ethnicity, religion, gender and/or race.

In 1907, a group of lawyers gathered in Carnegie Hall to address the prospect of forming a bar group where heritage and politics were not obstacles to

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, counsel for all parties received timely notice of *amicus*'s intent to file this brief and consented in writing. No counsel for any party authored this brief in any part; no person or entity other than *amicus* or its counsel made a monetary contribution to fund its preparation or submission.

inclusion. The bar leaders who met were determined to create, in the words of Hon. Joseph H. Choate, who would become president in 1912, "the great democratic bar association of the City [where] any attorney who had met the rigid standards set up by law for admission to the bar should, by virtue of that circumstance, be eligible for admission."

Throughout its history, NYCLA's bedrock principles have been the inclusion of all lawyers who wish to join, public education, and the active pursuit of legal system and public policy reforms at the local, state and national levels. NYCLA's groundbreaking 1952 report on public apathy toward delinquent children brought wide acclaim and won the endorsement of Mayor Robert F. Wagner. In 1943, the Association refused to renew its affiliation with the American Bar Association for its refusal to admit black lawyers. In 1949, NYCLA sponsored a conference on civil rights in the post-World-War-II era. In addition, NYCLA's Women's Rights Committee challenged and helped change provisions of the Internal Revenue Code that had a discriminatory impact on women and married couples.

For these reasons, NYCLA has a direct and vital interest in the issues before this Court. This brief has been approved by the NYCLA Executive Committee.

## SUMMARY OF ARGUMENT

New York is well-known as a city of loud-mouths. New Yorkers have opinions on every issue, and when

they voice those opinions, they don't mince words. In professional baseball stadiums, for example, New Yorkers boo their favorite players when they strike out, a form of expression that does not commonly occur in other cities in the United States. Mike Bates, *A Brief History of Booing in the Bronx*, THE HARDBALL TIMES (Apr. 30, 2018), https://www.fangraphs.com/tht/a-brief-history-of-booing-in-the-bronx/.

The esteem in which New Yorkers hold their right to voice their opinions is deeply engrained in New York's history and tradition. For example, even in colonial times, journalist and printer John Peter Zenger so often published uncomplimentary statements about the colonial governor that the governor imprisoned Zenger and sued him for libel. "The results of the trial had imbued the people with a new spirit; henceforth they were united in the struggle against governmental oppression, and as Gouverneur Morris has well said: 'The trial of Zenger in 1735 was the germ of American freedom, the Morningstar of that liberty which subsequently revolutionized America.'" Livingston Rutherford, JOHN PETER ZENGER HIS PRESS, HIS TRIAL, AND THE BIBLIOGRAPHY OF ZENGER IMPRINTS 131 (New York Dodd, Mead & Company 1905).

Exercising their right to free expression, New Yorkers have consistently tested and expanded the boundaries of that right. For example, in 1960, the New York Times took a chance when it published statements about civil rights issues in the South, which Montgomery, Alabama, Public Safety Commissioner L.B. Sullivan considered personally defamatory. His

libel lawsuit ended in a landmark decision from this Court upholding and expanding freedom of the press. *New York Times v. Sullivan*, 376 U.S. 254 (1964). A few years later, in 1971, the New York Times again tested the limits of free expression by printing the Pentagon Papers. Again, this Court ruled in favor of free expression. *New York Times Company v. United States*, 403 U.S. 713 (1971). This passion for the right and opportunity to speak one's mind underlies the instant case.

This passion led to the creation of public access channels that gave New Yorkers an uncensored forum to express themselves on matters of public concern, free of charge, and on a first-come, first-served basis. Laura Landro, *Public-Access TV In New York Tends Toward Sex, Sadism*, WALL ST. J., Dec. 20, 1982, at D1, 14. In 1970, the City of New York granted 20-year cable television franchises to two companies, which five years earlier, had begun laying cable wires under the streets of Manhattan. In exchange for granting them 20-year monopoly franchises and public easements to lay cable wires on public property in Manhattan, the City required that each company administer two channels for New York City's commercial-free self-expression. *Id.* The public access channels, while administered by the cable companies, were "owned" by the City—similar to the manner in which the City, when it sells land to real estate developers, retains ownership of a plot of land and requires the developer to build and maintain a public park or playground on that plot.

That same passion for free expression is why, in 1990, when the City negotiated the renewal of the Manhattan cable television franchise agreements, it included several provisions that strengthened the First Amendment rights of New Yorkers to freely express themselves on public access channels—most importantly by requiring that the public access channels be administered by a nonprofit community access organization chosen by the Manhattan Borough President, rather than by the cable companies themselves.

In 1991, Manhattan Borough President Ruth Messinger chose the Petitioner, Manhattan Community Access Organization, which does business as the Manhattan Neighborhood Network ("MNN"), to administer Manhattan's public access channels. As explained in public statements by Borough President Messinger and MNN's board chairperson, Gretchen Dykstra, the City considered public access channels to be public forums. Their statements demonstrated that the City believed a nonprofit community access organization would do a better job of administering the public access channels for the benefit of the public than the cable companies themselves. Importantly, MNN's mission was, and still is,

> to ensure the ability of Manhattan residents to exercise their First Amendment rights through moving image media to create opportunities for communication, education, artistic expression and other non-commercial uses of video facilities on an open and equitable basis.

> In providing services, we seek to involve the diverse racial, ethnic and geographic communities of Manhattan in the electronic communication of their varied interest, needs, concerns and identities.

MNN, ANN. REP. 2016, https://www.mnn.org/sites/default/files/mnn_ar_122917.pdf.

In sum, the City clearly intended to create a public forum when it created the nation's first public access channels in the 1970 Manhattan cable franchise agreements. The public access channels themselves constitute a form of property, of which the City retained ownership, in exchange for allowing the cable companies to lay their cable wires on public land. Unfortunately, because the public access channels were administered by the private cable companies, they were underfunded, underpublicized, and thus, underused by many of Manhattan's diverse communities. That is why, when the City negotiated the renewal of Manhattan's cable franchise agreements in 1990, it required that the public access channels be administered by a nonprofit community access organization ("CAO"), and further required that the newly formed Time Warner, Inc.—the parent company of both of Manhattan's cable operators—provide $5.35 million in startup funding for the Manhattan CAO to create additional public access channels. It also required that Time Warner agree to other terms that would ensure the CAO was properly funded, publicized and utilized by all of Manhattan's diverse community groups. Moreover, the City chose MNN to administer the public

access channels and mandated that MNN expand use of the public access channels by all of Manhattan's diverse communities, to ensure public access to a diversity of opinions—especially opinions not aired in mainstream media—on matters of public concern.

That decision—to create a public forum—should be respected. Especially where, as here, the public forum was created by the City with the explicit intent of increasing the diversity of voices and viewpoints on matters of public concern. As this Court has repeatedly reaffirmed, speech on matters of public concern "occupies the highest rung on the hierarchy of First Amendment values, and is entitled to speech protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

Petitioners argue that when the state delegates responsibility to an organization to administer the operation of its property, the organization's operation of the property does not constitute state action. But this is not that case. Here, the City of New York expressly created a public forum in 1970 when it launched the nation's first experiment with public access television, and in 1990, after the private cable companies had failed to adequately administer the public access channels for nearly twenty years, required as a condition of renewing the cable franchise agreements that the public forum be administered by an independent nonprofit community access organization—MNN. If the Court accepts Petitioners' argument, the only First Amendment-protected public forums would be the ones under strict state control. That should not be the only option. Allowing municipalities to partner with private

entities to create and administer public forums will lead to more free speech.

For these reasons, and the reasons detailed more fully herein, the decision below correctly found that Respondents' amended complaint pled sufficient facts to plausibly allege Manhattan's unique public access channels are designated public forums, and that Petitioners, as operators of the subject public access channels, are state actors under the facts of this case.

## ARGUMENT

### I. This Court should respect New York City's historic decision to create the country's first public access channels and designate them as public forums.

Public access television is the result of an experiment by the City of New York, which created the world's first public access channels in 1970. That year, the City awarded 20-year monopoly cable franchises to Teleprompter Corporation (later renamed Manhattan Cable TV), and Sterling Manhattan Cable (later renamed Paragon Cable). The original franchise agreements, signed in the summer of 1970, required both Sterling and Teleprompter to provide two public channels each by July 1, 1971. The agreements further required that additional public channels be made available as channel capacity expanded. Richard Calhoun, CTR. FOR PUB. POLICY RESEARCH, PUBLIC TELEVISION CHANNELS IN NEW YORK CITY: THE FIRST

SIX MONTHS 3 (1972), https://files.eric.ed.gov/fulltext/ED066897.pdf.

Sterling and Teleprompter needed easements to lay their cable wires on public property; in exchange, the City required that each company make two public access channels available to New Yorkers on a first-come, first-served basis, and that they provide adequate studio facilities and technological assistance to noncommercial individuals and groups. *Id*. at 1. The franchise agreements also prohibited the companies from controlling program content "except as is required to protect the Company from liability under applicable law." *Id*. at 27-28. The City's goal was that, by opening programming time for community dialogue, the public access channels would increase the diversity of opinions on matters of public concern.

The purpose of the public access channels was to afford New York's diverse communities a chance to discuss, "some of the problems that are unique . . . that are of interest" to them and to "encourage young people who were very militant in some areas who said that they . . . were denied access to some of the public media, to give them an opportunity to say what they wanted to say." *Id*. at 34.

The New York Times hailed the public access channels as, "the first genuine 'Town Meeting of the Air' and a major step toward the political philosopher's dream of participatory democracy," and recognized that the City and cable companies expected, "if successful, [would] set the pattern for the rest of the

country." George Gent, *City Starting Test of Public Cable TV*, N.Y. TIMES, July 1, 1971, at 95.

### A. 1965–1970: Manhattan's initial cable experiment.

The 1970 franchise agreements and creation of the four public access channels was a result of Manhattan's initial five-year experiment with cable television, which had begun on December 2, 1965, when New York City awarded the world's first major urban cable television franchises to Sterling and Teleprompter in Manhattan, and to CATV Enterprises in the Riverdale neighborhood of the Bronx. Clayton Knowles, *3 Given Franchises To Provide Cables For Better City TV*, N.Y. TIMES, Dec. 3, 1965, at 1, 78. Known as Community Antenna Television ("CATV"), the new service promised to ameliorate the reception problem experienced by 40 to 50 percent of Manhattan's approximately 554,900 television homes, caused by Manhattan's tall buildings, which interfered with television signals broadcast over the airwaves. Jack Gould, *Community-Antenna TV: Picture of Vast Potential*, N.Y. TIMES, Dec. 6, 1965, at 75.

CATV solved the interference problem by erecting a separate antenna where there was no interference. The antenna received broadcast signals and relayed those signals to subscribers via coaxial cables. Under the 1965 agreements, the companies obtained the right to run their cables beneath the City's streets, while the City maintained control of the rates and performance

standards. The Sterling franchise extended south from 86th Street on the East Side and 79th Street on the West Side of Manhattan Island, while the Teleprompter franchise extended north, covering the rest of the island. *Id*.

The 1965 franchise agreements required the companies to carry the City's 12 broadcast channels and prohibited "pay TV" and programming originated in other communities. Clayton Knowles, *3 Given Franchises To Provide Cables For Better City TV*, Dec. 3, 1965, N.Y. TIMES, p. 1, 78. The term of the "experimental" franchise agreements was just two years. Additionally, if the companies' profits exceeded seven percent, the City had the option of reducing installation and service charges. *Id*. Moreover, while the companies were limited to airing the City's 12 channels, the cables had the capacity to carry more than 30 channels. Leah Churner, *Out of the Vast Wasteland*, MOVING IMAGE SOURCE (June 18, 2009), http://www.movingimagesource.us/articles/out-of-the-vast-wasteland-20090618.

The potential public benefits of cable television were immediately obvious, so much so that, in June 1967, Mayor John Lindsay appointed a task force, chaired by Fred W. Friendly, the former president of CBS News and then-current Columbia University professor of journalism, to consider "how modern telecommunications technology can be best exploited to further the economic life and social well-being of the City, and how the benefits of this technology can best be preserved for all who live and work in the City."

Calhoun, *supra*, at 33. On September 18, 1968, the task force issued its report, finding that "[w]hat is at stake here is more than a method for the reception of television programs. We are ultimately concerned with methods of communication that can materially help educate our children and meet the special needs of those in the city who are economically and culturally deprived." Robert E. Dallos, *Advisers Propose More CATV in City*, N.Y. TIMES, Sept. 19, 1968, at 94. The task force concluded that cable franchise agreements should require the cable operators to reinvest some portion of their profits into "quality programming" that is in the "public interest." Calhoun, *supra*, at 13.

The cable companies publicly agreed that the new technology should be used, in part, to serve the interests of Manhattan's diverse communities. Manhattan Cable was "particularly pleased" that the Task Force report "supports what we have been advocating . . . for some time. That is that the full capabilities of the cable we're installing should be used in every way to benefit the community.'" Dallos, *supra*, at 94. Likewise, Teleprompter executive Irving Kahn agreed that cable companies had a duty to facilitate social change and must "face up to the realities of ghetto programming—and the whole spectrum of community relations, employee relations, hiring practices and other issues that go hand in hand with establishing and keeping an effective role in the community." Calhoun, *supra*, at 31.

### B. When New York City created the first public access channels in 1970 it designated them as a public forum.

When the City expanded its cable television experiment in 1970, the proposed contracts with the cable companies reflected the City's vision of public access for all New Yorkers. The new franchise agreements called for a channel capacity of 17 by July 1, 1971, and 24 within three years. Of the original seventeen channels, 11 would be for regular UHF and VHF broadcasting, two would be "public channels" and one would be for a "company channel" on which the companies could air their own original programming. Thereafter, additional channels would be allotted in a sequence of one city channel, two public channels, and three "additional channels" that the company could use for anything but "pay television." Calhoun, *supra*, at 27.

The franchise agreements required that access to the public channels be made available on a "first-come, first-served basis," and that the companies provide "adequate studio facilities" and "appropriate technical assistance" to "members of the public." Moreover, the companies were prohibited from controlling program content "except as is required to protect the Company from liability under applicable law" or programming that was essentially for a commercial purpose. Calhoun, *supra*, at 27–28.

The proposed franchise agreements also required the wiring of all prisons, hospitals, police and fire stations, day care centers and public schools free of

charge for the receipt of all "basic" FCC required services. Additionally, they required the companies to provide "the best possible signal available under the circumstances and quality reception of its Basic Service to each subscriber so that both sound and picture are produced free from visible and audible distortion." *Id.* The terms of the agreements were to be 20-years, and called for review of basic services by the City after five years, and rate review after eight years. Calhoun, *supra*, at 28.

Recognizing that support of the public access channels would be key to securing City approval of their proposed 20-year monopoly cable franchise agreements, executives from both Sterling and Teleprompter publicly expressed strong support for the City's vision of the public access channels. Charles F. Dolan, then President of Sterling, the holder of the southern Manhattan franchise, stated that the proposed new contract was "a bold effort to open the doors wide to community participation in cable television. Under this contract no one is excluded." Calhoun, *supra*, at 28. Similarly, Teleprompter executive Irving Kahn rebuffed critics of the proposed contracts, stating, "[a]ny contention that we have not, may not or will not operate in the public interest is false. Our record to date is one of public service. Our promise to you safeguarded by the language of a very tough, expertly drawn contract is that we will always operate in the public interest." Freddie Ferretti, *City Delays Its Decision on CATV Policy*, N.Y. TIMES, July 24, 1970, at 63.

The City ratified the proposed franchise agreements, thereby creating the world's first public access television channels.

### C. The cable companies' operation of Manhattan's public access channels under the 1970 franchise agreements was inadequate.

The agreements themselves left unanswered questions regarding public access administration, funding, and the level of editorial control that the companies could assert. Accordingly, in 1971, the City drafted interim rules for Manhattan's public access channels, "to establish that anybody and everybody who wanted an opportunity to be heard could get on and be heard." Calhoun, *supra*, at 43. The only restrictions were on obscene material and programming by unaccompanied minors (under the age of 18). *Id*. at 44.

The companies requested that applications for time allotments be submitted two weeks in advance, but that time could generally be shortened if needed. *Id.* The information required to be submitted included the program's length, subject, list of individuals appearing in it, whether it was live or taped, the sponsoring organization or individual, and whether studio facilities would be required. *Id*.

Public Access Channel C was for series programming, and Public Access Channel D was for non-series programming. The City's Interim Rules required that

space on Channel C be awarded on a first-come, first-served basis with no more than two hours of prime time (7:00-11:00 p.m.) being assigned to any one user. *Id*. Users were also limited to seven hours of total program time per week, unless there were open time slots. *Id*. Channel D was for non-series, or occasional, instead of regular, programming. Programmers were limited to no more than one exposure in a specific time slot per month and would be bumped if their total programming for the month was greater than five hours between both channels. *Id*.

During the early years, the biggest challenge for public access programming was informing communities that the channels were available for their use, free of charge. George Gent, *Public Access TV Here Undergoing Growing Pains*, N.Y. TIMES, Oct. 26, 1971, at 83. Besides publicity, the other problem was money. The main video production centers were run by nonprofit organizations and funded with seed money from private foundations. *Id*.

As predicted, the Manhattan cable franchise agreements became a model for franchising authorities nationwide. Throughout the 1970s and 1980s, most franchising authorities required cable companies to create and administer public access channels as a condition of running cable wires on public property. By 1989, public access was "a vital part of almost 2,000 CATV systems across the United States." Douglas Davis, *Public-Access TV Is Heard in the Land*, N.Y. TIMES, June 11, 1989, at 231.

Just like Sterling and Teleprompter, these other companies knew that public access was a "major consideration in awarding cable franchises." Laura Landro, *Public-Access TV In New York Tends Toward Sex, Sadism*, WALL ST. J., Dec. 20, 1982, at 1, 14. Unlike New York, however, other franchising authorities awarded cable franchises pursuant to open bidding processes, which led cable companies "to try to outdo each other with multimillion-dollar grants for public programming, lots of studios, large production staffs and crews, and state of the art equipment." *Id*. Because of the large amount of money they received, public access boomed "in virtually every large community beyond Manhattan." Douglas Davis, *Public-Access TV Is Heard in the Land*, N.Y. TIMES, June 11, 1989, at 231.

On the other hand, the Manhattan cable franchise agreements, and New York City and State regulations, provided stronger First Amendment protections for its public access channels. This led Manhattan's "underfinanced channels C and D [to] offer . . . programming that [was] thoroughly unique" and "stretch[ed] our rigid notion of what television [could] be, or do." *Id*. Manhattan's public access channels remained "citadels of electronic democracy," that offered "on shoestring budgets" a variety of programs such as "high-minded seminars on topics ranging from urban decay to sexist mythology, video-art experiments featuring frisky computerized graphics and earnest documentary studies of often neglected subjects—like the plight of the disenfranchised or the perils of hibiscus mold." *Id*.

Ironically, while Manhattan public access television was still truly avant-garde, on February 2, 1989, in NBC's Manhattan studios, Saturday Night Live aired a sketch called *Wayne's World*, centered on a fictional local public access television program in Aurora, Illinois, hosted by Wayne Campbell (Mike Myers), an enthusiastic and sardonic long-haired metalhead, and his timid and sometimes high-strung, yet equally metal-loving sidekick and best friend, Garth Algar (Dana Carvey). Noel Murray, *10 Things You Didn't Know About Wayne's World*, ROLLING STONE, Feb. 14, 2017, https://www.rollingstone.com/movies/movie-news/10-things-you-didnt-know-about-waynes-world-115363/. *Wayne's World* quickly became one of the show's most popular recurring sketches—appearing a total of 19 times. *Id*. In 1992, Mike Myers and Dana Carvey's Wayne's World movie, based on the sketches, became the 8th highest grossing movie of the year. *Id*. Since its release, the movie has grossed a total of approximately $180 million. *Wayne's World*, BOX OFFICE MOJO, https://www.boxofficemojo.com/movies/?id=waynesworld.htm (last visited Jan. 15, 2019).

### D. The City extracted concessions from Time Inc. and Warner Communications Inc. to improve public access programming during their merger negotiations.

It was in this backdrop that on March 4, 1989, Time Inc. and Warner Communications Inc. announced their plan to merge into Time Warner, Inc. and become the largest media company in the world. The merger

negotiations took place approximately one year prior to expiration of the Manhattan cable franchise agreements held by Manhattan Cable Television (formerly Sterling) and Paragon Cable Manhattan (formerly Teleprompter), both of which were owned by subsidiaries of Time Inc.

When Time and Warner Communications announced their planned merger on March 4, 1989, both companies had to obtain approval from the City to transfer the six cable franchises that they owned or controlled into the merged corporation, including Manhattan Cable TV and Paragon Manhattan Cable. David W. Dunlap, *Panel Questions Time-Warner Plan*, N.Y. TIMES, May 28, 1989, at 33. Time Inc. owned the two Manhattan franchises, and Warner Communications owned four franchises in Queens and Brooklyn. *Id*. Combined, the companies controlled cable television in 60 percent of New York City's households. *Id*. The transfer negotiations were hampered by, *inter alia*, the cable operators' failure to comply with all of the requirements of the 1970 franchise agreements. Under the terms of the 1970 franchise agreements, Time Inc. was supposed to have completed laying cable wire to all of Manhattan's residential buildings by 1974. As of March 1989, however, an estimated 200,000 residents lived on blocks that had not yet been wired. David W. Dunlap, *Pact May Improve Cable TV Service*, N.Y. TIMES, June 16, 1989, at B3. The unwired blocks were located primarily in Harlem and the Lower East Side, Manhattan's poorest and most racially segregated neighborhoods. *Id*.

City officials were particularly concerned that Harlem and the Lower East Side were disproportionately underserved by the cable operators. *Id*. They were also concerned that with one company controlling the majority of New York City's cable programming, program diversity would decrease. David W. Dunlap, *Panel Questions Time-Warner Plan*, N.Y. TIMES, May 28, 1989, at 33.

Gerald M. Levin, vice chairman of Time Inc., who would become vice chairman of Time Warner, answered that Time Warner was "absolutely committed" to diversity, which he said was more a product of the number of channels than the number of operators. *Id*. After several months of negotiations, the City approved the franchise transfers on June 15, 1989. David W. Dunlap, *Pact May Improve Cable TV Service*, N.Y. TIMES, June 16, 1989, at B3. As a condition of the approval, however, Time Inc. agreed to complete the wiring of all residential blocks in Manhattan by July 1990—and thereby increase public access viewership—before the expiration of the original franchise agreement. John L. Hanks, director of the city's Bureau of Franchises, stated that Time "stood no chance whatever, as things stood a few months ago," of getting a renewal. *Id*. The agreement to transfer the franchises did not affect the 1990 expiration dates of the underlying franchise agreements.

### E. The City used the renewal provisions of the Cable Communications Policy Act of 1984 to force Time Warner to make significant investments to improve public access programming in Manhattan.

Renewal negotiations were likewise hampered by the cable companies' failures with respect to public access. "From the city's point of view, the transmission of noncommercial programs by the public, government and nonprofit institutions is the most important issue in cable's future." Editorial, *Topics of The Times; The Midnight TV Drama*, N.Y. TIMES, May 19, 1990, at 22. Because Manhattan Cable and Paragon had failed to adequately fund, promote or encourage their use, "[n]estled in the heart of the country's most sophisticated audience, access television languishe[d], like a child starving amid plenty." Douglas Davis, *Public-Access TV Is Heard in the Land*, N.Y. TIMES, June 11, 1989, at 31.

The renewal negotiations were governed by the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (the "Cable Act"), which provided procedural and substantive rules for renewing cable franchise agreements. 47 U.S.C. § 546(a)–(g). But for Cable Act rules establishing the reasons a franchise authority may refuse to renew a cable franchise, and the standards and procedures the Act established, the City likely would have lacked the bargaining power to obtain strong protections for public access channels, including the administration of those channels by an

independent not-for-profit community access organization.

The Cable Act was intended, *inter alia*, to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems" through procedures and standards that "encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. §§ 521(3), 521(2).

The Cable Act reflects Congress' intent that "a cable operator whose past performance and proposal for future performance meet the standards established by this section [will] be granted renewal," H.R. Rep. No. 98-934, at 7 (1984), 1984 U.S.C.C.A.N. 4667. Thus, the Cable Act recognizes that a cable franchise operator has "a significant federal property expectation" in the renewal of its franchise. *Eastern Telecom Corp. v. Borough of East Conemaugh*, 872 F.2d 30, 35 (3d Cir. 1989). Nonetheless, the Act does not guarantee the operator renewal.

The Cable Act establishes formal franchise renewal procedures at 47 U.S.C. §§ 546(a)–(g). The formal renewal process can be initiated by either the franchising authority (on its own initiative) or the cable operator (by submitting a written renewal notice to the city) during the six-month period beginning three years before franchise expiration. If the operator does not submit a request to the city during this six-month window, the city is under no legal obligation to follow

formal Cable Act procedures—unless the city has commenced a formal proceeding on its own initiative.

At the same time, the Cable Act permits a franchisee to pursue informal negotiations with the franchising authority. Thus, the statute explicitly encourages state and local cable franchisors and operators to pursue a "two-track" process, whereby a franchising authority simultaneously pursues both the formal and informal renewal processes. State and local franchisors must establish procedures which allow them to proceed on both tracks.

A franchising authority may deny renewal if, after the required administrative proceedings, the authority finds any of the following:

- the cable operator has failed to substantially comply with the material terms of the existing franchise and with applicable law;
- the quality of the operator's service has been unreasonable in light of community needs;
- the operator lacks the requisite financial, legal or technical ability; or
- the operator's proposal is inadequate to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

47 U.S.C. § 546(c)(1).

A renewal request may be denied based on any one of the four statutory factors. 47 U.S.C. § 546(d)(1). However, a decision not to renew cannot be based on

past defects in performance if (a) the operator was not given notice and an opportunity to cure the defects, or (b) if the city has waived its right to object or has acquiesced in past failures to perform by failing to object after receiving written notice from the operator of a "failure or inability to cure." *Id*.

Because of the Manhattan cable operator's failure to comply with the requirements of the 1970 franchise agreements, and their weak proposals for public access going forward, on May 16, 1990, the City preliminarily denied renewal of the two cable television franchises. Todd S. Purdum, *Time Warner Loses a Vote on Cable TV*, N.Y. TIMES, May 16, 1990, at 29–30. Manhattan Borough President Ruth Messinger negotiated with Time Warner until minutes before the renewal vote, pressing company executives for more public access funding and better production facilities for public access producers. *Id*.

The denial triggered an administrative hearing under the Cable Act's formal renewal provisions. *Id*. At the same time, Time Warner and the City continued to negotiate informally.

Several weeks later, negotiators reached agreement on several points. The main area of disagreement concerned the amount of capital and operational support that Time Warner would contribute for public access channels. Leonard Buder, *Time Warner Is Closer to a Cable Franchise Pact*, N.Y. TIMES, June 3, 1990, at 40.

After several more weeks of negotiations, Time Warner ultimately agreed to several provisions demanded by the City to ensure the public access channels were properly funded and administered, and the City renewed the franchise agreements on June 27, 1990. James Barron, *Cable TV Rates Likely to Rise in Manhattan With New Pact*, N.Y. TIMES, June 28, 1990, at 1, 30.

### F. The 1990 Manhattan cable franchise agreements strengthened the First Amendment rights of Manhattan's residents to freely express themselves on the public access channels.

When the City negotiated renewal of the franchise agreements in 1990, it used the Cable Act and other legal developments to require Time Warner to improve and strengthen public access television in Manhattan. It did so by requiring, *inter alia*, that, instead of being administered by the companies themselves, the public access channels be administered by a nonprofit community access organization chosen by the Manhattan Borough President; Time Warner provide $5.35 million in startup capital funding to the community access organization; and Time Warner fund a community access grant program by paying the community access organization a fee of $3 per cable subscriber per year.

Thereafter, acting on behalf of the City of New York, Manhattan Borough President Ruth Messinger chose the Petitioner, Manhattan Community Access

Organization, which does business as the Manhattan Neighborhood Network ("MNN"), to administer Manhattan's public access channels. MNN's mission is to train "community-based organizations to produce public access shows telling their individual stories" and to ensure the ability of Manhattan's residents to exercise their First Amendment rights. Gretchen Dykstra, *Public Access TV Gets Communities Involved*, N.Y. TIMES, May 31, 1993, at 22.

MNN's bylaws and franchise agreement with the City protect quintessential New York free speech rights—MNN must air residents' programs on a first-come, first-served basis, and MNN and the City are prohibited from exercising editorial control or otherwise regulating public access programs based upon content.

Borough President Messinger reaffirmed the City's intent to create a public forum in a press release on May 16, 1991, the day MNN's initial board of directors ratified its bylaws. Messinger stressed that the bylaws contained several provisions that she had insisted be included, including that MNN have "an open and independent board."[2] Messinger highlighted several bylaw provisions:

> * A 19-member board, representing the ethnic, economic and geographical diversity of Manhattan will, one year after the CAO begins training sessions for public access

[2] Press Release dated May 16, 1991 is appended to this brief.

producers, include six slots reserved for active public access producers.

* The establishment of an Advisory Nominating Committee, to recommend individuals for the six public access producer slots on the Board.

* Tough prohibitions against conflicts of interest, ensuring the independence and integrity of the Board.

* In addition to its Annual Meeting the Board will hold at least two meetings each year that will be open to the public.

Borough President Messinger stressed that MNN was committed to ensuring that experienced community programming producers will participate in the governing and setting of MNN's policies through reserving six of the 18 seats on the board of directors for such community producers.

The franchise agreement required that Time Warner provide $5.35 million to MNN as initial startup capital to purchase studio space and equipment. Before the funds were disbursed, MNN was required to submit a capital expenditure plan to the Borough President and State Commission on Cable Television, detailing how it intended to spend the funds. The franchise agreement also required Time Warner to fund a community access grant program by paying MNN a fee of $3 per cable subscriber per year.

The changes in the 1990 franchise agreement were intended to ensure that Manhattan's public

access channels remain a public forum where all Manhattan residents could freely express themselves. The renewed agreement amplified the voices of public access producers by requiring significant investment in production facilities, community training in video production and editing, and most importantly, by delegating administration of the public access channels—which remain City property—to a nonprofit community access organization. These choices were informed by 20-years of neglectful administration by Manhattan's cable operators and were intended to strengthen the First Amendment protections of New Yorkers to freely express themselves on Manhattan's public access channels.

Administration of government property is a public function, and the vehicle for protecting First Amendment rights is 42 U.S.C. § 1983. Thus, MNN is a state actor and was properly sued under § 1983 in this case.

## II. This Court should encourage public forums like Manhattan's public access channels because they create more speech.

When the City of New York launched the world's first experiment with public access television in the 1970 Manhattan cable franchise agreements, it intended to create a public forum, and it succeeded. Twenty years later when the City renewed the Manhattan cable franchise agreements in 1990, it intended to strengthen the First Amendment protections for the public access channels, and to expand the public

forums by creating additional public access channels. Again, it succeeded. The City of New York's decision to create a new public forum should be respected and protected by this Court, because it creates more speech. As this Court has repeatedly reaffirmed, speech on matters of public concern "occupies the highest rung on the hierarchy of First Amendment values, and is entitled to speech protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

Petitioner's position, by contrast, would inhibit free speech because it would limit the only First Amendment-protected public forums to the ones under strict state control. That should not be the only option.

Allowing state and local governments to partner with private entities to create and administer new public forums should be encouraged and protected by this Court because doing so creates more speech and amplifies diverse viewpoints, which is essential to the functioning of our democracy. Where the government clearly intended to create a public forum, the forum's administration by a private nonprofit corporation, instead of the government itself, should not preclude a finding that the forum is subject to constitutional protections. This is especially true, where, as here, speech on the public forum is uncensored and uninfluenced by commercial interests, and administered on a first-come, first-served basis. Under these circumstances, the intent to create a public forum could be inferred—however, as demonstrated throughout this brief, and in Respondents' brief, there is no need to infer the City's intent, as numerous City officials, cable company

executives, and MNN members have explicitly stated that the City's intent was that the public access channels would be a First Amendment-protected public forum.

This Court has "frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). This case involves just such a matter of vital local concern: New York City's courageous experiment with public access television in Manhattan. City officials, cable operators and the media all acknowledged, when Manhattan launched the nation's first public access television in 1971, that the experiment would set an example for other state and local franchising authorities nationwide.

New York City learned from its experiment. Thus, when it renewed its cable franchise agreements with Time Warner in 1990, the City significantly improved public access television in Manhattan. Most importantly, the 1990 franchise agreements removed administration of the public access channels from the cable operators themselves, and instead required that all of Manhattan's public access channels be administered by a nonprofit community access organization.

Importantly, courts have held that they should defer to state and local franchising authorities' determinations of their community's cable-related needs and interests. *See Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434 (6th Cir. 1997). In *Sturgis*, the Sixth Circuit

Court of Appeals held that the city franchising authority's "knowledge of the community give it an institutional advantage in identifying the community's cable needs and interests." 107 F.3d at 441. Particularly significant was the court's determination that the "granting of a cable franchise is a legislative act traditionally entitled to considerable deference from the judiciary." *Id*. The court found that judicial review of "a municipality's identification of its cable-related needs and interests is very limited" and that a court should defer to the franchising authority's identification of the community's needs and interests except to the extent necessary to weigh the needs and interests against the cost of implementing them. *Id*. The standard of review the court found appropriate is to view the evidence in the light most favorable to the City, giving it the "benefit of all reasonable inferences," and only reverse if "reasonable minds could not come to a conclusion" other than that reached by the City. *Id*.

This Court should defer to New York City's decision to create a public forum, administered by a private nonprofit community access organization—MNN. The administrative structure of Manhattan's current public access channels was chosen by the City after 20 years of operating the nation's first public access channels under the 1970 franchise agreements. Based on that experience, the City chose to retain some features of the original public access channels—administering time slots free of charge; on a first-come, first-served basis; prohibiting editorial control—and to change other features that inhibited their ability to achieve

the goal of functioning as the proverbial "electronic soap box." Specifically, the City found the private cable company's administration of the public access channels led them to be underfunded, underpublicized and underused. Thus, in 1990, in renewing the Manhattan cable franchises, the City delegated administration of the public access channels to a private nonprofit community access organization, chosen by the Manhattan Borough President, that was properly funded, publicized, and uninfluenced by either the cable operator or the City government.

This case demonstrates the importance, in our federal system, of our state and local governments retaining the freedom to experiment on matters of public concern. Nearly a half-century ago, New York City embarked on the freedom enhancing experiment of designating Manhattan's public access channels as public forums, and it continued that experiment in 1990 when it renewed the cable franchise agreements and delegated the administration of the public forum public access channels to a private nonprofit. Its decision deserves respect.

## CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted,

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