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 *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND NATIONAL COALITION AGAINST CENSORSHIP, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES & REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 2 million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the ACLU with approximately 120,000 members in New York State.

The ACLU and NYCLU are steadfast defenders of First Amendment freedoms. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases protecting the freedom of speech, including *Whitney v. California*, 274 U.S. 357 (1927); *Hague v. CIO*, 307 U.S. 496 (1939); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *New York Times v. Sullivan*, 376 U.S. 254 (1964); and *New York Times v. United States*, 403 U.S. 713 (1971). The ACLU also served as counsel for Petitioners in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

Because this case requires the Court to distinguish between private action, which is protected by the First Amendment, and state action, which is constrained by the First Amendment, its proper resolution is a matter of significant concern to

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

the ACLU, NYCLU, and their members. Public access channels in New York City were created and are maintained to provide expressive opportunities for a diversity of voices and viewpoints; New York's commitment to ideological diversity is therefore additionally implicated in this case. The ACLU and NYCLU support that commitment and for that reason, as well, the resolution of this case is of concern to amici and their members.

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, students, readers, and the general public. NCAC has a longstanding interest in opposing viewpoint-based censorship and is joining in this brief to urge the Court to preserve First Amendment protections where states dictate content decisions on public access channels. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents argue principally that Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network ("MNN") is a state actor because it performs a public function. This brief argues that MNN's broadcast content decisions constitute state action whether or not MNN is performing a public function. Those decisions are

properly attributable to the state, not any private decision-maker, because federal, state, and city laws and policies so strictly circumscribe MNN's content decisions that all independent editorial judgment is displaced. Thus, it is the state, not MNN, that is responsible for MNN's content decisions.

With rare exceptions, the Constitution is designed to regulate public actors, not private individuals. This fact requires the Court to pay careful attention to who is responsible when nominally private actors engage in conduct in coordination with or on behalf of government actors. The essential inquiry asks whether given conduct is properly attributable to a private party, and so free of constitutional constraint, or to the state, and therefore bound by the Constitution's requirements. Just as it would be inappropriate to impose constitutional constraints on truly private decision-making, so it is wrong to allow the government to evade constitutional limits by delegating its power to private parties while retaining control.

Over the course of the last century, governments at all levels have turned to private entities to carry out governmental work. *See, e.g.*, Paul C. Light, *The True Size of Government*: *Tracking Washington's Blended Workforce, 1984-2015*, The Volcker Alliance 3–4 (2017), https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf. In the last two decades, this has grown increasingly true at the federal level, *id.*, and "service contracting is now mainstream, championed by leading officials across the political spectrum." Jon D. Michaels, *Privatization's Progeny*, 101 Geo. L.J.

1023, 1025 (2013) (footnotes omitted). The widespread shift of federal and state government work to private organizations "is now ubiquitous in military combat, municipal policing, rule promulgation, environmental policymaking, prison administration, and public-benefits determinations," among others. *Id.*; *see also, e.g.*, *Government by Contract: Outsourcing and American Democracy* (Jody Freeman & Martha Minow eds., 2009).

The Constitution generally allows governments to delegate their operations to private actors, and to determine the parameters of those delegations. In some circumstances, such delegation results in the private entity engaging in state action. This includes situations in which the government essentially controls the details of the nominally private actor's work. "If the Fourteenth Amendment [and other constitutional rights are] not to be displaced," such delegations ought not afford the government a haven to bypass its constitutional obligations. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

There is no one state action test under existing doctrine—nor, contrary to Petitioners' position, are there simply five. Rather, the crux of the question, in its various formulations, is whether the actions of an entity can be fairly attributed to the state.

Here, the answer is yes, because federal, state, and city laws and policies combine to leave no meaningful discretion to MNN, a nominally private entity, over the decision at issue. The public access channel MNN operates is, moreover, wholly a creation of the state, and is, in all meaningful senses here, property in which the government retains a

proprietary interest. New York City negotiated with its cable operator to preserve a proprietary interest in the public access channel, and subsequently designated MNN as its agent to administer the channel for it. Access to the channel remains free to the public by law, further illustrating the channel's essentially public character. MNN is thus not only subject to regulations that divest it of any independent editorial discretion; it is charged with carrying out, without discretion, New York's plan for the provision of a government service, free of charge, over a public easement.

The combination of federal, state, and city laws and policies that governs MNN compelled the creation of the public access channel, selected MNN to run it, and established the rules for what content MNN must broadcast (all First Amendment protected content) and how it must schedule programming (on a first come, first served basis). This delegation of authority to run a government service on property in which the government retains a proprietary interest removes any private judgment from MNN's content decisions. It leaves MNN with only the task of implementing the government-mandated "first-come, first-served" rule for any First Amendment protected content. Accordingly, MNN's content decisions are properly attributable to the state, not to independent private judgment—because in its content decisions, MNN literally has no authority to exercise independent private judgment.

The fact that MNN may have misapplied the "first-come, first-served" rule that by law governs its content decision-making does not alter the result. If MNN had turned Respondents away on the ground

that it deemed their speech unprotected, Respondents would have a First Amendment claim, even if MNN misapplied the rule. The same holds true here. Because the state has essentially occupied the field and left no discretion to MNN in carrying out the government's terms with respect to any content decision, MNN's every content decision is attributable to the state.

Holding that MNN is a state actor for the limited purpose of its content decisions will have little, if any, bearing on the work of public access channel operators in other places, which function under distinct statutory regimes. Governments easily can—and do—choose to set up their public access channels in ways that do not make the organizations running them state actors. Had New York chosen to give MNN broad editorial discretion to adopt, for example, "programming in the public interest," to profile issues of local concern, or to cater specifically to children—as other states and localities have chosen to do—MNN's decision to refuse to broadcast particular content might not constitute state action. The overwhelming majority of states do not require their channel operators to broadcast all content protected by the First Amendment on a first-come, first-served basis.

Resolving this case on the grounds asserted here will also have no implications for social media platforms and other private media outlets. The parade of horribles invoked by Petitioners and some amici, including the Chicago Access Corporation ("CAC"), the Electronic Frontier Foundation ("EFF"), and the Cato Institute ("Cato"), is unfounded. A private entity's voluntary choice to accept content

indiscriminately has no First Amendment or state action implications precisely because it is the private entity's choice, not the state's regulation, that determines the ultimate decision. But MNN did not "choose" to adopt a "first-come, first-served" content rule; that rule was imposed upon it by New York as a condition of operating the public access channel. To find state action where the state itself eliminates private discretion over the administration of a government service on property in which the government retains a proprietary interest has no implications for private entities that choose, of their own free will, to operate platforms on a first-come, first-served, or any other, basis.

STATUTORY AND REGULATORY BACKGROUND

Respondents DeeDee Halleck and Jesus Papoleto Melendez challenge MNN's decision to ban the broadcast of their video and the subsequent consequences of that ban, including Respondents' suspensions from broadcasting other content on MNN. As set forth below, MNN's decision about whether to broadcast particular content is entirely governed by a combination of federal, state, and city laws, the requirements of which are also reflected in a contract between MNN, a public access channel operator, and Time Warner, a cable operator, pursuant to requirements imposed by the City.

1. Federal Law

For a cable operator to reach subscribers in a particular region, it must obtain a franchise from the local government. Federal law—specifically, the Cable Communications Policy Act of 1984 (the "1984

Cable Act")—allows local governments to require, as part of any such franchise, that the cable operator designate channel capacity for public, educational, or government ("PEG" or "public access") use. 47 U.S.C. § 531(b). If a local government chooses to require public access channels, as most do, the Act also endows local governments with the authority to "enforce any requirement in any franchise regarding the providing or use of [public access] channel capacity." *Id.* § 531(c).

Pursuant to the 1984 Cable Act, public access channels are thus entirely the creation of local or state governments—and if the governments so choose, can be operated as public forums. The House Report for the 1984 Act described public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 98-934 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.

In this respect, the 1984 Cable Act enshrined prior practices. Manhattan's first public access stations, for example, were established in the early 1970s. Resp. Br. 6. Those channels relied on "cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers." *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 628 (1994). Installation of the cables often required the physical uprooting of public streets to enable the establishment of the cable system. *Id.* In those early days of cable television, public access channels were

largely governed by franchise agreements between local governments and cable operators. Resp. Br. 4 (citing *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 788 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

Although the 1984 Cable Act disallows cable operators (here, Time Warner) from exercising "editorial control" over any public access channel, § 531(e), it leaves significant discretion to state and local governments about whether, and if so how, to run such channels. *See id.* § 531(b) (stating that a local government "may require rules and procedures for the use of [public access] channel capacity"). Accordingly, different states and localities have chosen to run their public access channels quite differently, as reflected in their statutes and in many operating entities' ultimate programming policies. As we show below, in its choice to eliminate any content discretion from the public access channel operator, New York stands virtually alone.

2. New York State Law

New York's statutory scheme for public access channels is highly prescriptive. It requires local governments to establish a public access channel as part of any cable franchise above a certain size, and to designate an "entity" to operate the channel. N.Y. Comp. Codes R. & Regs. tit. 16, §§ 895.1(f), 895.4(b)(1), (c)(1). And New York state law sets forth strict parameters for how that entity must make broadcast decisions, both in terms of what to broadcast and when.

First, New York law requires that a public access channel operator broadcast any content that is protected by the First Amendment. New York law defines "public access channel" as "a channel designated for noncommercial use by the public on a first-come, first-served, *nondiscriminatory* basis." *Id.* § 895.4(a)(1) (emphasis added); *see also* Resp. Br. 27 n.9 (noting that MNN accepts that state law bars it from exercising editorial discretion). This means that the public access channel operator must broadcast material without reference to its content, unless the content is not protected by the Constitution. *See* 47 U.S.C. § 559 (making it a federal crime to transmit unprotected content); *see also* Community Access Organization "CAO" Grant and Use Agreement by and Between Time Warner Entertainment Company, L.P. and Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network § 4.1 ("CAO Agreement") (requiring MNN to comply with all local, state, and federal laws with respect to program content). Thus, MNN does not have the freedom to choose among the virtually infinite varieties of protected content; if the content is protected, MNN must broadcast it.[2]

Second, New York law requires the public access channel operator to schedule all First

[2] New York further forbids cable franchisees (here, Time Warner) from "exercis[ing] any editorial control" over protected content, N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(8), and municipalities from "exercis[ing] any editorial control over any use by the public of a public access channel except as may be permitted by law." *Id.* § 895.4(c)(9).

Amendment protected content on a "*first-come, first-served*, nondiscriminatory basis." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(4) (emphasis added). Together, these provisions eliminate any independent editorial discretion over content selection or scheduling.

Third, New York law establishes public oversight over the public access channel operator's content and scheduling decisions. It requires the public access channel operator to maintain records about how it fulfills its broadcasting duties by collecting the names and addresses of all persons using or requesting to use any public access channel. *Id.* § 895.4(c)(10). The law also requires the operator to make those records "available for public inspection for a minimum of two years." *Id.*

In combination, these regulations leave MNN no meaningful discretion about what content to broadcast or when; instead, New York law dictates the terms of all broadcast decisions and MNN must simply carry them out, subject to public oversight. This combination of regulations is exceedingly rare. It is entirely the result of the state's regulatory choices, and is not the approach taken by nearly any other state, or by New York in regulating any other broadcast or cable channels.[3]

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[3] Amici have been able to identify only two other states and a small number of local governments that also mandate this rule: Rhode Island, Hawaii, St. Louis, MO, and some towns in Minnesota. *See, e.g.*, 815 R.I. Admin. Code § 10-05-1.14.1; St. Louis City Ordinance 8.29.140. Some other state and local governments also offer a "first come, first served" scheduling rule—but only as one of many options available to its public

3. New York City Law

New York City ("the City") further entrenches this regulatory system through its agreements with cable franchisees. As required by state law, when the City entered into franchise agreements with Manhattan-area cable operators, it created public access channels and negotiated a proprietary interest in them for public access. *See* Resp. Br. 34. Time Warner Cable ("TWC" or "Time Warner") is the City's current franchisee, and the City requires TWC to dedicate six channels to public access content. *Id.* And, pursuant to the Manhattan Borough President's authority under the agreement, the City has designated MNN to administer the channels. *See* 2008 Cable Franchise Agreement by and between The City of New York and Time Warner Entertainment Company, L.P., §§ 1.18, 8.1.7–8.1.12 ("Franchise Agreement").

To carry out these requirements, TWC and MNN entered into another agreement, under which MNN must "comply with all applicable local, state, and federal laws with respect to program content on the Public Access Channels," including the first-come, first-served nondiscriminatory rule, and the prohibition on broadcasting content that is not protected by the First Amendment. *See* CAO Agreement § 4.1.

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access channel operators. *See, e.g.*, Minn. Stat. Ann. § 238.084(z) (expressly authorizing municipalities to determine whether or not public access channels must be "available for use by the general public on a first-come, first-served, nondiscriminatory basis"); West Sacramento Channel 21 Operating Rules and Procedures §§ 9.1, 10.1.

Further, the City dictates the terms under which TWC provides multi-million dollar grants to MNN and how such funds will be used. Franchise Agreement § 8.3; CAO Agreement §§ 2.1–2.3. Finally, the City retains some governmental influence over MNN's board of directors: the Manhattan Borough President appoints two individuals to MNN's Board of Directors, which currently includes ten directors, one director emeritus, and two non-voting members. *MNN Staff*, Manhattan Neighborhood Network, https://perma.cc/A2VX-7QUF; *see also* Resp. Br. 7 n.1.

4. Other State and Local Schemes Differ Markedly from New York's

Public access channels come in many forms. *Denver Area*, 518 U.S. at 762 (describing the wide-ranging "system of public, private, and mixed nonprofit elements [that], through its supervising boards and nonprofit or governmental access managers, can set programming policy and approve or disapprove particular programming services"). Most states and local governments have rules governing public access channels, but, unlike New York, the vast majority do not seek to eliminate all content discretion of the channel operator. Rather, most state and local laws prescribe broad goals for public access channel operators, and leave the operator substantial room for independent editorial judgment.

Tennessee, for example, has defined "PEG programming" as "local interest programming," such as local government meetings, community events, educational programming, and community news. Tenn. Code Ann. § 7-59-309. Similarly, in Coeur

d'Alene, Idaho, public access channel operators are directed to broadcast "information concerning local government and public education." Coeur d'Alene, Idaho, Mun. Code § 2.100.040.

In Illinois, local governments choose to give their public access channel operators discretion. Chicago Access Network Television ("CAN TV"), administered by amicus CAC, for example, has the discretion to "impose reasonable limitations" in order to facilitate a number of goals, including "representative diversity of programming," "overall composition and flow," "building viewership with a viable program schedule," and "scheduling flexibility." CAN TV Access User Manual § II.A, https://cantv.org/wp-content/uploads/2018/11/2018-User-Manual-1.pdf. In addition, CAN TV defines its own scheduling priorities, which give preference to local and timely programming. *Id.* § II.B.

In Springfield, Ohio, public access channel operators can broadcast "accurate information on local municipal government affairs, on matters which would promote the public peace, health, safety, welfare and attractiveness of the community and on matters which would promote responsible citizenship in the community." City of Springfield, Ohio, Codified Ordinances § 121.04. These standards leave broad discretion for content choices by the public access channel operator.

Oklahoma leaves its municipalities the choice of whether or not to require public access channels at all. Where public access channels are established, Oklahoma law gives their operators the option of "provid[ing] a '*family friendly*' tier of video services in lieu of . . . public access." Okla. Stat. Ann. tit. 11,

§ 22-107.1(D) (emphasis added).

Los Angeles takes perhaps the most discretionary approach. There, the Cable Television Access Corporation exercises its discretion to broadcast what it deems "the 'Best Of' Public Access programming in the City of Los Angeles." Public Access Guidelines, L.A. Cable Access Corp., https://perma.cc/JE7W-P87H.

In addition to discretion to make content decisions, other state and local governments also offer public access channel operators varying amounts of discretion about scheduling. For example, in West Sacramento, California, public access channel operators can schedule programming "according to particular themes (e.g., public affairs, sports, ethnic, etc.)" and based on the "production quality of programs." West Sacramento Channel 21 Operating Rules and Procedures § 9.1, https://www.cityofwestsacramento.org/home/showdocument?id=712.

As these examples show, state and local governments can decide to give public access channel operators broad editorial discretion. And they have done so in a wide variety of ways, creating discretion to do everything from airing the "best of" content to profiling issues of local concern to catering specifically to children. But states may also choose, as New York has here, to take full responsibility for content selection by dictating the terms in such a way as to eliminate private editorial judgment altogether.

ARGUMENT

I. THE STATE ACTION INQUIRY IS DESIGNED TO IDENTIFY WHEN THE STATE IS RESPONSIBLE FOR A PARTICULAR ACTION.

MNN should be deemed a state actor for purposes of its content decisions because it is New York, not MNN, that has determined the rules that govern all content decision-making on a channel designated by law for free government service, and those rules deny MNN any independent editorial control. By definition, any content decision MNN makes is therefore an implementation of New York's terms, which wholly control content aired on its public access channel.

The state action inquiry exists to determine whether nominally private conduct can "be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (formulating the inquiry as whether the action "may be fairly treated as that of the State itself").

This inquiry is essential for two reasons. On the one hand, it allows courts to preserve "an area of individual freedom by limiting the reach of federal law;" on the other, it "assure[s] that constitutional standards are invoked when . . . the State is responsible." *Brentwood*, 531 U.S. at 295 (internal marks and alterations omitted). The latter assurance is necessary because "[t]he Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392

(1995) (quoting *Ex parte Virginia*, 100 U.S. 339, 346–347 (1879)). Given this combination of interests, properly applying the state action inquiry requires a fine balance. Expanding the reach of state action too far could intrude impermissibly on the freedom of private actors, who are generally not subject to the Constitution even when they perform functions at the government's behest or subject to regulation. At the same time, if the Court is too restrictive about identifying state action, government actors would be able to sidestep the Constitution by nominally delegating authority to private entities while actually retaining governmental control.

"What is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood*, 531 U.S. at 295. Indeed, this Court has defined state action broadly as "necessarily following upon 'state participation through any arrangement, management, funds or property.'" *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (quoting *Cooper v. Aaron*, 358 U.S. 1, 4 (1958)). At the same time, the Court has specified "a host of facts that can bear on the fairness of such an attribution." *Brentwood*, 531 U.S. at 296.[4] "Whether these different tests are actually

[4] For example, the Court has found state action where (1) "the State creates the legal framework governing the conduct," *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988); (2) the State exercises "coercive power" or (3) "significant encouragement, either overt or covert," *Brentwood*, 531 U.S. at 296 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)); (4) a private actor and the state willfully engage in "joint activity," *id.* (quoting *Lugar*, 457 U.S. at 941); (5) an "agency of the State" controls the private actor, *id.* (quoting *Pennsylvania v. Board of*

different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court," *Lugar*, 457 U.S. at 939, "they all have a common purpose. [The] goal in every case is to determine whether an action 'can fairly be attributed to the State.'" *Brentwood*, 531 U.S. at 306 (Thomas, J., dissenting) (quoting *Blum*, 457 U.S. at 1004).

Achieving that goal requires a "necessarily fact-bound" inquiry. *Lugar*, 457 U.S. at 939; *see also Evans*, 382 U.S. at 299. Each case must be assessed on its own facts, and while "[f]acts that address any of the [state action] criteria are significant, . . . no one criterion must necessarily be applied." *Brentwood*, 531 U.S. at 303. Rather than requiring strict adherence to any specific test, this Court has insisted on "careful attention to the gravamen of the plaintiff's complaint" in considering whether a case presents state action. *Blum*, 457 U.S. at 1003. Engaging in such an inquiry here reveals that MNN's challenged conduct was state action.

Directors of City Trusts of Philadelphia, 353 U.S. 230 (1957) (*per curiam*)), (6) the State delegates a public function to a private actor, *id.* (citing *West v. Atkins*, 487 U.S 42, 56 (1988)); (7) the private actor and government are "entwined," either through governmental policies or the government's involvement in the private actor's management or control, *id.* (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)); and more. As this list shows, the dissenting judge below and Petitioners both oversimplify existing doctrine by suggesting that there are five discrete state action tests.

II. ALL OF MNN'S DECISIONS REGARDING WHAT CONTENT TO BROADCAST ARE STATE ACTION.

A. MNN's Broadcast Decisions are State Action Because State Law Dictates a "First-Come, First-Served" Policy That Leaves MNN No Discretion Over Broadcast Decisions in the Provision of a Free Government Service.

MNN's conduct in this case constituted state action because government regulation wholly determines MNN's broadcast and scheduling decisions: under New York law and the contracts required by the City, MNN had to broadcast Respondents' program, as First Amendment protected content, "on a first-come, first-served, nondiscriminatory basis." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(a)(1).

MNN is, moreover, providing a government service free of charge over a public easement. As described above, New York City negotiated with TWC to preserve a proprietary interest in the public access channel, *see* Resp. Br. 34, and designated MNN to administer that channel, *id.* at 36. It retains the power to appoint two of MNN's board members, and it continues to require that access to the channel remain free to the public by law.

These facts make all of MNN's decisions about what content to broadcast "fairly attributable to the State." *Lugar*, 457 U.S. at 937. The Court has recognized that a regulatory regime that dictates the choice a private actor must make establishes state

action. In *Adickes v. S.H. Kress & Company*, for example, this Court held that where "the . . . act by the private party is compelled by a statutory provision . . . it is the State that has commanded the result by its law." 398 U.S. 144, 171 (1970). In *Adickes*, the Court held that "a state-enforced custom" dictating a particular result was enough to create state action. Here, express state law displaces all independent editorial judgment and wholly dictates MNN's content decisions.

Similarly, this Court has held that nominally private action should be treated as state action when it "becomes not [the purportedly private actor's] voluntary choice but the State's choice." *Barrows v. Jackson*, 346 U.S. 249, 254 (1953). In *Barrows*, the state's power to impose sanctions on a private actor for making a particular choice transformed the private actor's choice from voluntary to state-determined. Here, the same effect is created by the fact that the 1984 Cable Act endows local governments with the authority to "enforce any requirement in any franchise regarding the providing or use of [public access] channel capacity," 47 U.S.C. § 531(c), and by New York's choice to impose a "first come, first served" regulatory requirement for all protected speech. N.Y. Comp. Codes R. & Regs. tit. 16, §§ 895.4(a)(1), (c)(4).

The state action here is bolstered by the fact that MNN and New York City are "willful participant[s] in [the] joint activity," *Brentwood*, 531 U.S. at 296, of maintaining the public access channel. In essence, the City entered into franchise agreements that allowed Manhattan-area cable operators to build infrastructure on city property, in

exchange for which the City required them to provide public access channels. *See* Resp. Br. 34. The City retained operational authority over the public access channels, in the form of what might be described as a technological easement. The City designated MNN as its agent to operate the public access channel in 1991, under strict terms that control its every content decision. *Id.* 7, n.1. MNN has, in turn, entered into the CAO Agreement, which requires MNN to "comply with all applicable local, state, and federal laws with respect to program content on the Public Access Channels"—again including the first-come, first-served rule for protected speech. CAO Agreement § 4.1.

The critical role played by the "first-come, first-served" law in the state action inquiry here is made clear by two cases in which this Court declined to find state action, *precisely because state law did not dictate the private entity's decision.* In *Blum v. Yaretsky*, the Court found no state action where statutes and regulations required physicians or nursing homes to complete forms relating to patient discharge or transfer decisions, but did not mandate the substance of those decisions, which "*ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State*." 457 U.S. at 1008 (emphasis added). Similarly, in *American Manufacturers Mutual Insurance Co. v. Sullivan*, the Court held that private insurers are not state actors because "the decision to withhold payment, like the decision to transfer Medicaid patients to a lower level of care in *Blum*, is made by concededly private parties, and *turns on judgments made by private parties without standards established by the State*."

526 U.S. 40, 52 (1999) (internal marks omitted and emphasis added). Here, by contrast, the standard governing MNN's choice as to content has been established by the state, and has wholly displaced private decision-making, such that MNN's content decisions cannot be said to be its own private judgments.

When government standards, rather than private-sector standards, dictate the result a nominally private actor must reach, circuit courts have accordingly found state action. For instance, in *Focus on the Family v. Pinellas Suncoast Transit Authority*, the Eleventh Circuit found that a nominally private actor responsible for approving or rejecting advertisements in bus shelters engages in state action "where the state contractually requires the private actor to take particular actions—e.g., to reject proposed advertisements under certain specifically delineated circumstances." 344 F.3d 1263, 1278 (11th Cir. 2003).

Similarly, in *Catanzano by Catanzano v. Dowling*, the Second Circuit held that the decisions made by home health care service providers about whether and how to provide home health care to Medicaid recipients constituted state action because "[s]ignificantly, unlike in *Blum*, the decisions made by the [home health care providers] are not purely medical judgments made according to professional standards. Instead, [a New York statute] requires the[m] to determine whether the health and safety of the recipient can be maintained 'as defined by the department of health in regulation.'" 60 F.3d 113, 119 (2d Cir. 1995); *see also Kraemer v. Heckler*, 737 F.2d 214, 220 (2d Cir. 1984) ("[T]here is a far

stronger basis for finding state action in the decisions [of nominally private parties] which evaluate entitlement to Medicare benefits" in part because the "decision-making process itself appears to be governed largely by statute, regulation, HCFA manuals, and transmittal letters.").

In *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008), the Second Circuit likewise found that an accounting firm's decisions about whether to pay defendants' legal fees based on whether or not they "cooperated" constituted state action in part because the government *defined the standard* for what constituted "cooperation." Unlike the physicians and nursing homes in *Blum*, the court explained, the firm in *Stein* "was never 'free to define' [the relevant standard] independently" of the government. *Id.* at 149. Rather, the government defined cooperation, and the private entity was bound by that definition. *Id.*

Similarly, MNN is not "free to define" what content to air on its public access channels. New York has removed any private discretion by requiring MNN to grant airtime to any content protected by the First Amendment in the order that MNN receives it. *See* N.Y. Comp. Codes R. & Regs. tit. 16, §§ 895.4(a)(1), (c)(4). As in *Focus on the Family*, *Catanzano*, and *Stein*, the government has set forth the standards by which the nominally private actor, MNN, must make its decision. MNN cannot rely on any independent criteria or otherwise exercise independent discretion when determining whether to broadcast particular content. Accordingly, its broadcast decisions constitute state action.

By contrast, had New York permitted MNN to operate a public access channel pursuant to a broad delegation of editorial control—for example, by directing it to broadcast programs that are of local interest, as in Tennessee; by specifying only that it be family friendly, as in Oklahoma; or by permitting it to choose to focus on building viewership and representing diversity, as in Chicago—MNN would be left substantial discretion to make independent decisions about what content to broadcast. Those decisions would generally not be fairly attributable to the state, precisely because the state rule would have afforded the private entity broad latitude for its own private decision-making. Here, instead, New York law essentially occupies the field with respect to content selection, compelling MNN to operate the station on a "first-come, first-served" basis without any of its own editorial discretion.

Under this narrow approach, MNN's other actions—for example, its employment or contracting decisions—would not necessarily be state action. The question presented by this case is merely whether MNN is a state actor *for the purpose of selecting and scheduling the content it broadcasts*. The fact that one part of a private entity's conduct constitutes state action need not rob it of its private designation for other conduct. *See, e.g.*, *Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981) (holding that, while a public defender is not engaging in state action when she advocates for her client, she may be engaging in state action when she "perform[s] . . . functions" for the state, notwithstanding the fact that the state is her employer in both cases). MNN is not necessarily a state actor with respect to the many other activities as to which it enjoys discretion to act independently.

It is, however, a state actor for the purpose of selecting and scheduling content.

B. The Fact that MNN's Particular Decision Apparently Misapplied the State's Rules Does Not Defeat State Action.

Amicus Chicago Access Corporation ("CAC") argues that because MNN's action seems to have contravened, rather than enforced, the "first-come, first-served" rule, MNN did not act "under color of state law," and its actions are not attributable to the state. CAC Amicus Br. 9–11. But because MNN has been delegated authority to administer a government service over a public easement under a "first-come, first-served" rule that eliminates any private discretion over content, MNN's *every* content decision is controlled by, and therefore attributable to, the state.

MNN cannot make any content decisions except pursuant to New York's content rule, which affords MNN no independent editorial judgment. That MNN may have *misapplied* state law does not mean that it is not a state actor, any more than the fact that a police officer violates his departmental rules on use of lethal force relieves his actions from constitutional constraint. Respondents claim that MNN's application of the New York state rule to them violated the First Amendment. Because the state is the source of the rule, the city delegated authority to implement the rule to MNN, and the state rule leaves MNN no independent private discretion, MNN's actions are properly attributable to the state.

This can be illustrated by a slight variation on the facts. If MNN rejected Respondents' content on the ground that it deemed the speech unprotected by the First Amendment, surely Respondents would have a First Amendment claim, precisely because MNN, as the city's delegate, would be implementing a state-imposed rule that affords no room for discretion. (Because speech is either constitutionally protected or not, there is no room for discretion.) Whether MNN *erred* in concluding that the content in question was unprotected would not make its actions private rather than state action. So, too, here. The fact that MNN may have misapplied the "first-come, first served" rule does not transform state action into private action.

In this way, this case is akin to a state official "in the exercise of the authority with which he is clothed, misus[ing] the power possessed to do a wrong forbidden by the [Constitution]." *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913); *see also United States v. Classic*, 313 U.S. 299, 326 (1941). Such violations are governed by the Constitution regardless of the violation of state law. *Classic*, 313 U.S. at 326.

CAC relies heavily on *Lugar*. But that case is distinguishable. There, the Court held that the mere fact that a private party invokes a statutory prejudgment attachment remedy does not transform the private party's wholly discretionary choice to invoke the attachment regime into state action. *Id.* at 939. *Lugar* held that "[a]ction by a private party pursuant to this statute, without something more, [i]s not sufficient to justify a characterization of that party as a 'state actor.'" *Id.* But here, there is

"something more." Unlike the private party in *Lugar*, which had full discretion to seek attachment, here MNN has *no discretion* whatsoever with respect to broadcast content decisions. The state rule wholly displaces private decision-making. And MNN is not any private party, but an entity explicitly delegated authority to administer access to a government service over a public easement.

C. The Court Need Not Reach the Public Function or Public Forum Questions to Resolve this Case.

Because state action flows from the state's decision to leave MNN no independent editorial discretion whatsoever in administering its public access channel, the Court need not reach the question of whether this or any other public access channel is a public forum—or whether maintenance of a public forum constitutes a public function, as Respondents maintain. The fact that federal, state, and city law have combined to dictate the only decision MNN can properly make about whether and when to broadcast content on the public access channel is sufficient for the state action inquiry. Accordingly, the Court can follow the approach it took in *Denver Area* and decline to address whether public access channels in general constitute public forums. It is "unwise and unnecessary definitively to pick one analogy or one specific set of words" as public access channels come in many different forms. *Denver Area*, 518 U.S. at 742.

The question presented by this case is not whether all public access channels are public forums, or whether all public access channel operators are state actors. It is only whether MNN in particular is

a state actor for purposes of content decisions under the special rules imposed by New York and New York City. The state action inquiry asks whether conduct can fairly be attributed to the state. The public forum inquiry asks whether a particular space or medium must be open to the public for speech purposes, either as a matter of tradition or through government designation. These are distinct inquiries.

Of course, the specific rule New York has chosen to impose—first-come, first-served for any content protected by the First Amendment—is highly relevant to *both* the state action and public forum inquiries. The choice to open a channel for speech on a first-come, first-served basis strongly supports the establishment of a designated public forum. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (noting that government action in both traditional and designated public forums is bound by the same standards). And New York's "first-come, first-served" rule also renders MNN's content decisions attributable to the state because the state has so completely displaced MNN's independent editorial judgment.

But while the facts of this case may support both a finding of state action and public forum status, the underlying theories are ultimately distinct, and the Court need not determine whether or not public access channels generally, or under New York law specifically, constitute public forums in order to resolve this petition.

Nor need the Court determine whether maintaining a public access channel is a "public function" traditionally reserved to government. Even if it is not, the combination of laws applicable here

displaces private judgment by wholly dictating all content decisions with respect to a free service provided on property in which the state maintains a proprietary interest. That is sufficient to establish state action.

A finding of state action here will not implicate the status of the vast majority of other public access channel operators, much less of wholly private actors that operate large-scale communications platforms, like Facebook, Twitter, and YouTube. It is a red herring to suggest that if Petitioners are state actors in this case, all other public access channels and social media platforms are, too. As shown above, most states and localities afford substantial independent editorial discretion to their public access channel operators. A finding of state action here, based on the complete preclusion of independent editorial discretion, will have no bearing on the status of different public access channel arrangements.

D. A Finding of State Action Here Will Have No Untoward Consequences for Private Media Providers.

Finally, finding MNN to be a state actor for purposes of its content decisions would have no implications whatsoever for private social media platforms that choose content on their own terms. It is settled law that the mere fact that private entities open their property for public use—which is the similarity some amici appear to see between MNN and social media companies, *see, e.g.*, EFF Br. 4–10, Internet Association Br. 16, Cato Br. 13—does not transform the space into a public forum. *Hudgens v. Nat'l Labor Relations Bd.,* 424 U.S. 507, 519 (1976).

Indeed, as amici argue, a private platform's independent decision to accept content of a particular type is generally a manifestation of the private party's own expressive choices, itself likely protected by the First Amendment and other constitutional provisions. Nor does a private entity's independent choice to accept a broad variety of content even remotely create state action.

The facts presented by this case could not be more different from the operation of social media companies. Unlike social media companies, MNN has authority to run the public access channel *only* because that authority has been delegated to it by the city and state, and the public access channels it manages exist only because the city has demanded that they be created as a condition on cable operators' access to public rights of way. Social media platforms were not created by the government, nor are their operators chosen by the government. Moreover, as discussed at length above, the statutory regime governing the operation of public access channels in New York takes a uniquely heavy hand in dictating MNN's content decisions; social media companies' content decisions are not governed by regulation that is in any way similar. To the contrary, federal law generally shields them from liability for how they moderate content created by third parties. *See* 47 U.S.C. § 230(c).[5]

[5] Lower courts have considered whether public officials who block individuals from commenting on their social media pages violate the First Amendment. *See, e.g.*, *Davison v. Randall*, No. 17-2002, 2019 WL 114012 (4th Cir. Jan. 7, 2019), *as amended* (Jan. 9, 2019); *Leuthy v. LePage*, No. 1:17-CV-00296-JAW, 2018

In general, common carriers are likewise entirely different. The fact that a private business is heavily regulated does not make it a state actor. *Jackson*, 419 U.S. at 350. Here, the state has not merely sought to regulate a private business. Rather, it has used its sovereign authority to negotiate a public proprietary interest in public access channels, and then delegated the implementation of a free government service on that channel to MNN pursuant to strict terms that wholly control its content decisions.

Thus, if the Court conducts the careful, fact-bound inquiry as suggested here, the parade of horribles envisioned by Petitioners and other amici will not come to pass. Unlike MNN, public access channel operators in most states are not statutorily required to broadcast all protected speech on a first-come, first-served basis. And the circumstances of social media sites and other online platforms lie even further afield. This case asks the Court only to determine whether MNN engaged in state action, and the Court can easily answer "yes" without

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WL 4134628 (D. Me. Aug. 29, 2018); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1691 (2d Cir. June 5, 2018). Such cases have considered, first, whether public officials engage in state action when they administer a social media account, or whether they are acting as private speakers. Only upon finding state action have courts considered whether a public official's social media page constitutes a public forum. This case presents only an analog of the first question, and does not implicate the second—much less whether all social media platforms are public forums, a question not raised by any of these cases.

disturbing the operation of nearly any other public access channel or that of online platform operators.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully Submitted,

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Dated: January 18, 2019