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 FOR *AMICUS CURIAE* CHICAGO ACCESS CORPORATION IN SUPPORT OF PETITIONERS


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## STATEMENT OF INTEREST[1]

*Amicus* Chicago Access Corporation (CAC) is a local, community-based 501(c)(3) private foundation tasked with managing public-access television channels in Chicago, Illinois. CAC owns and operates Chicago Access Network Television (CAN TV), which was established 35 years ago to provide ordinary, work-a-day Chicagoans with an otherwise unattainable digital media platform to engage with their community. CAC is a non-governmental, non-commercial, non-tax-supported foundation that seeks to promote and develop maximum public awareness of, usage of, and involvement in television for educational, cultural, civic, health, social service, and other non-profit purposes. To that end, CAC provides technical training, video equipment, studio facilities, television program channel time, and online hosting of unique non-commercial video content not typically accessible through commercial mass media outlets. CAC submits this *amicus* brief because the decision below is divorced from the realities of public-access television and threatens the viability of CAC and public-access channel operators across the country.

## SUMMARY OF ARGUMENT

A defendant cannot be held liable under §1983 unless it deprived the plaintiff of federal rights while acting "under color of state law." This "under color of

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

state law" element is not satisfied unless *two* separate requirements are met, not just the one requirement addressed in the decision below.

The first requirement, which has received little discussion in this case, is that the claimed deprivation must result from an action with its *source in state authority*—for example, when the defendant exercises rights conferred by a state statute. The second requirement, which the parties refer to as the "state action" requirement, is that the defendant be a person who may fairly be said to be a "state actor." CAC agrees with petitioners that this case does not satisfy the second requirement, as none of this Court's "state actor" tests are satisfied. But this case even more clearly does not satisfy the *first* requirement. Specifically, respondents do not allege that MNN was exercising state-conferred authority when it took the actions challenged in this case; to the contrary, respondents allege that MNN acted *in violation of* state law by refusing to air their program on a first-come, first-served basis. Respondents' remedy is thus not under §1983, but under state law.

If this Court chooses to address whether MNN's public-access channels are public forums (in the constitutional sense), it should hold that they are not because they are private property in which the government holds no formal interest. The public-forum doctrine is a rule that governs claims of a right of access to *public* property. Indeed, every single one of this Court's public forum cases has involved property in which the government has held at least some property interest; it is that property interest that the government has designated as a public forum.

Here, respondents have not alleged that the government holds any property interest in MNN's public-access channels. Accordingly, the government cannot designate MNN's public-access channels public forums.

To be clear, CAC is steadfastly committed to fostering and supporting freedom of speech and freedom of expression, and does not have a policy of censoring the content of its producers. CAC's participation in this case is not driven by any desire to restrict content or restrain speech. Indeed, CAC's *raison d'être* is to provide a forum for Chicagoans to freely express their thoughts and ideas. But none of that means that CAC exercises state authority or that CAC is a state actor. To the contrary, CAC is a non-governmental, not-for-profit corporation that receives *no* State funding, has *no* State officials on its Board, and exercises *no* State power. Likewise, none of that means that CAC's channels should be subject to the same strict constitutional standards that apply on public streets and in public parks. The decision below is divorced from the realities of public-access television and would impose unwarranted and counterproductive burdens on public-access operators.

## ARGUMENT

### I. Respondents Do Not Satisfy Either Part Of The Two-Part Test For Determining Whether Action Is Taken "Under Color Of State Law."

CAC agrees with petitioners that the Second Circuit erred by failing to apply any of this Court's tests for determining whether MNN, a private non-profit entity, may be characterized as a "state actor."

And CAC further agrees with petitioners that MNN is not a "state actor" under any of the tests this Court has previously applied, including the "exclusive public function" test on which respondents rely. Petr.Br.38-55; *see infra* Part I.C. Before addressing that issue, however, it is important to recall that there is *another* threshold element to the *two*-part test for determining whether a challenged action was taken "under color of" state law. 42 U.S.C. §1983. As this case illustrates, lower courts have had an unfortunate tendency to ignore that prong altogether, even when, as here, it provides a straightforward ground on which to resolve a case.

### A. Section 1983 Establishes a Two-Part Test for Determining Whether Action Was Taken "Under Color of State Law."

A defendant does not violate 42 U.S.C. §1983 unless the conduct that allegedly deprived the plaintiff of a federal right was taken "under color of any statute, ordinance, regulation, custom, or usage, of any State." As shorthand, courts often say that this element is satisfied when the challenged action was taken "under color of state law" or if it was "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). While courts (including the court below) commonly suggest or hold that conduct is "fairly attributable to the State" whenever one of this Court's various "state action" tests is satisfied, *see, e.g.*, Pet.App.9, 45, those "state action" tests are pertinent only to the *second* part of what is in fact a *two*-part test.

This Court's cases "reflect a two-part approach to this question of 'fair attribution.'" *Lugar*, 457 U.S. at

937. The first requirement is that "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.* at 939. The second requirement, which the parties refer to as the "state action" requirement, is that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937; *accord Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Georgia v. McCollum*, 505 U.S. 42, 51 (1992); *Wyatt v. Cole*, 504 U.S. 158, 162 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

These two requirements are "related," but "not the same." *Lugar*, 457 U.S. at 937. The two requirements "collapse into each other" when the defendant is a state official (*e.g.*, a police officer), but they "diverge" where, as here, the defendant is a "private party." *Id.* The first requirement focuses on the *source of authority* for the challenged conduct, while the second requirement focuses on the *identity* of the actor. A comparison of this Court's cases makes the distinction clear.

The first requirement was dispositive in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). There, defendant Moose Lodge refused to serve a beverage to the plaintiff because he was black. *Id.* at 164-65. The plaintiff filed suit under 42 U.S.C. §1983, alleging that "the refusal of service to him was 'state action'" because "the Pennsylvania liquor board had issued appellant Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises." *Id.* at 165. This Court disagreed, holding that Moose Lodge could not be held liable under §1983

because its "decision to discriminate could not be ascribed to any governmental decision." *Lugar*, 457 U.S. at 938 (discussing *Moose Lodge*). While the government's decision to authorize Moose Lodge's sale of alcoholic beverages played a causal role in some attenuated sense, that governmental decision was, for purposes of §1983, "unconnected with [the] discriminatory policies" that caused the plaintiff's injury. *Id.* Thus, the State was not the source of authority under which Moose Lodge applied its discriminatory policy.[2]

In contrast, the second requirement was dispositive in *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). There, after the plaintiff was evicted from her apartment, she agreed to have her possessions sent to a warehouse owned by defendant Flagg Brothers. *Id.* at 153. When she failed to pay for the cost of storage, Flagg Brothers threatened to invoke a New York statute that permitted it to sell her property to recover the amount due. *Id.* The plaintiff filed suit under §1983, arguing that such a sale would violate her due process and equal protection rights. *Id.* The first requirement was satisfied because Flagg Brothers was

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[2] *See also Blum v. Yaretsky*, 457 U.S. 991, 1008-09 (1982) (doctors' decisions to transfer Medicare patients did not have source in state law because they were "medical judgments" not "dictated by any rule of conduct imposed by the State"); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (private school's decisions to fire counselor and teachers "were not compelled or even influenced by any state regulation"); *Polk Cty. v. Dodson*, 454 U.S. 312, 320-25 (1981) (public defender's decision to withdraw from case did not have source in state law because she acted according to the canons of professional ethics in a role adversarial to the State, and thus was "free of state control").

acting pursuant to a state statute that specifically permitted the threatened sale; the State thus was the source of Flagg Brothers' authority to act. *Id.* But this Court held that Flagg Brothers could not be held liable under §1983 because the lawsuit did not satisfy the second requirement—*i.e.*, because there was a "total absence of overt official involvement." *Id.* at 157. The Court applied the "exclusive public function" test and the "compulsion" test, *see* Petr.Br.41-48, and concluded that Flagg Brothers could not be treated as a state actor under either test. *Flagg Bros.*, 436 U.S. at 157-66.

This Court's decision in *Lugar* further clarifies the two-part test. In *Lugar*, the defendant (Edmonson Oil Co.) sued on the plaintiff's debt and, through an *ex parte* procedure permitted by state law, obtained prejudgment attachment of the plaintiff's property. 457 U.S. at 924-25. The plaintiff sued under §1983, alleging that Edmonson acted jointly with the State to deprive him of his property without due process of law. *Id.* at 925. The plaintiff's complaint alleged two counts that are relevant here: Count Two alleged that Edmonson violated his due process rights by *misusing* the state-law attachment procedure; Count One alleged that the state-law attachment procedure itself, even if followed, was constitutionally defective. *Id.* at 940-41.

Count Two, premised on the defendant's alleged *misuse* of the state law, did not satisfy the *first* part of the two-part test because the challenged conduct did not have a "source in state authority." *Id.* at 939-40. If, as alleged, Edmonson *misused* the state-law procedure and thus *violated* state law, Edmonson's

conduct "could not be ascribed to any governmental decision; rather, [Edmonson was] acting contrary to the relevant policy articulated by the State." *Id.* at 940. In other words, the plaintiff pleaded himself out of court on that claim: The allegation that Edmonson "invoked the statute without the grounds to do so" meant that Edmonson's conduct "could in no way be attributed to a state rule or a state decision." *Id.* Accordingly, that count did "not state a cause of action under §1983 but challenges only private action." *Id.*

In so holding, this Court distinguished the rule that a *state official* (*e.g.*, a police officer) acts under color of state law even when he abuses or misuses his authority. *Id.* at 940. When it comes to state officials, this Court long ago established that the Fourteenth Amendment's protections apply when "an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the [Fourteenth] Amendment." *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). As the Court noted at the time, however, that rule applies only where the defendant is a state "officer" exercising "the authority with which he is clothed." *Home Tel.*, 227 U.S. at 287. The rule does not apply when the defendant is a private entity that is not and never held itself out to be clothed with state authority. Thus, the Court in *Lugar* explained that "this case does not fall within the abuse of authority doctrine" because Edmonson did not "have the authority of state officials to put the weight of the State behind their private decision." 457 U.S. at 940; *see Collins v. Womancare*, 878 F.2d 1145, 1152 (9th Cir. 1989) ("[T]his 'abuse of

authority' doctrine does not apply if the challenged action is one undertaken by a *private party* rather than a state official.").

On the other hand, Count One—which was a challenge to the constitutionality of the state law itself—satisfied both parts of the test under §1983. Whereas the "private misuse of a state statute" alleged in Count Two could not "be attributed to the State," Count One challenged the statute itself, and "the procedural scheme created by the statute obviously is the product of state action." *Lugar*, 457 U.S. at 941. Accordingly, action taken pursuant to the statute "properly may be addressed in a §1983 action, if the second element of the state-action requirement is met as well." *Id.* The Court then applied the "joint participation" test, *see* Petr.Br.48-50, and concluded that the County Sheriff's participation in effectuating the attachment and seizure was sufficient to satisfy that second element of the test. *Lugar*, 457 U.S. at 941-42.

### B. Respondents Have Not Alleged Any Action Attributable to State Law.

Respondents in this case cannot satisfy the first part of the two-part test set out in *Lugar*. They do not allege that the deprivation of their rights "resulted from the exercise of a right or privilege having its source in state authority." *Lugar*, 457 U.S. at 939. To the contrary, like the plaintiff in *Lugar*, they allege that petitioners *violated* state law. Their allegation that MNN acted contrary to state law means that, by their own telling, MNN's conduct can "in no way be attributed to a state rule or a state decision." *Id.* at 940.

As respondents stated in their brief in opposition, "State law … prohibits public access channels from exercising editorial control." BIO.1; *see* BIO.8 ("[T]he City obligates MNN to adhere to the state-law requirement that it run noncommercial content … on a 'first-come, first-served' basis."). The crux of respondents' complaint is that MNN violated those state laws by exercising editorial control over their content and refusing to air their programs on a first-come, first-served basis. *See, e.g.*, JA-39. "To say this, however, is to say that the conduct of which [they] complained could not be ascribed to any governmental decision; rather, [MNN was] acting contrary to the relevant policy articulated by the State." *Lugar*, 457 U.S. at 940. If, as respondents allege, MNN acted contrary to state law by exercising editorial control, then MNN's conduct "could in no way be attributed to a state rule or a state decision." *Id.* Accordingly, and regardless of whether any of the various "state action" tests discussed below is satisfied, respondents' complaint does "not state a cause of action under §1983." *Id.*

Respondents cannot solve this problem by pointing out that the City "delegated administration of the public access channels to petitioner MNN." BIO.7. That conclusion follows directly from *Moose Lodge*. In *Moose Lodge*, as noted, the State authorized Moose Lodge to sell alcoholic beverages; thus, without State involvement, Moose Lodge could not have discriminated against the plaintiff by refusing to serve him alcohol. 407 U.S. at 175-77. That attenuated connection, however, was not enough to ascribe Moose Lodge's decision to discriminate to the State. *Id.*; *see also Lugar*, 457 U.S. at 937-38; *Blum*, 457 U.S. at 1004

("Mere approval of or acquiescence in the initiatives of a private party is not sufficient."). Just so here. The fact that the City delegated administration of public-access channels to MNN 27 years ago does not mean that everything MNN has done since can be attributed to the State. That is especially true where, as alleged here, respondent maintains that the State does not merely acquiesce in the challenged conduct, but actually *prohibits* it. Respondents' allegation that MNN acted contrary to state law "does not describe conduct that can be attributed to the state." *Lugar*, 457 U.S. at 941.

This does not mean that respondents do not have a remedy—it just means that they do not have a remedy in federal court under §1983. And given that the crux of their complaint is that MNN violated state law, the remedy respondents do have is in the exact place it should be: under state law. *See* Petr.Br.59-60; *see Flagg Bros.*, 436 U.S. at 176-77 (Stevens, J., dissenting) ("If there should be a deviation from the state statute—such as a failure to give the notice required by the state law—the defect could be remedied by a state court and there would be no occasion for §1983 relief."). In particular, the New York State Public Service Commission ("PSC"), "as the agency charged with enforcing the rules regarding public access channels, has a procedure in place for complaints and is clothed with adequate investigatory powers to ensure compliance with the pertinent rules." *Ass'n of Cable Access Producers v. Pub. Serv. Comm'n*, 1 A.D.3d 761, 763-64 (N.Y. App. Div. 2003). In short, respondents may seek relief from the PSC for any alleged violation of the first-come, first-served policy.

Directing respondents and similarly aggrieved parties to state and local remedies also ensures that disputes will be resolved in the appropriate forum. Where, as here, a plaintiff believes that a public-access channel has violated the applicable regulatory requirements, the plaintiff may seek a remedy with the body (like the PSC here) that has subject-matter expertise and procedures well-suited for such disputes. If, however, a plaintiff believes that the state laws themselves are unconstitutional—*e.g.*, if a state law required public-access channels to "block[] 'patently offensive' sex-related material," *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 753 (1996)—the plaintiff can seek relief directly against the state under §1983.

**C. MNN Is Not a State Actor.**

Respondents also do not satisfy the second part of the *Lugar* test, as MNN may not "fairly be said to be a state actor." 457 U.S. at 937. As petitioners explain, this Court has analyzed whether a defendant is a state actor by applying an "exclusive public function" test, a "compulsion" test, a "joint action" test, and an "entwinement" test, among other formulations. Petr.Br.38-55. In the decision below, however, the Second Circuit did not apply any of those tests. Instead, it asked whether MNN's public-access channels *would* be a public forum *if* MNN was acting "under color of state law," and then bootstrapped its (incorrect) answer to that question into an (incorrect) answer to the state-actor question. Neither that reasoning nor the result it produced can be reconciled with this Court's precedents.

The Second Circuit began by enumerating the various state-actor tests, Pet.App.9, but instead of applying any of those tests, it turned immediately to the forum question. Indeed, the very next sentence (and next eight paragraphs of analysis) were about "whether the public access channels in the pending appeal are public forums." Pet.App.10-14. Then, after focusing principally on the extent to which they are held open to the public for use, the court concluded that public-access channels are public forums because "[a] public access channel is the electronic version of the public square." Pet.App.13.

The court did not return to the state-actor question until after it had decided that public-access channels are public forums. And when it did so, it *still* did not apply any of this Court's state-actor tests. Instead, it treated the public-forum holding as all but dispositive of the state-action question. In the court's view, because "locations deemed to be public forums are usually operated by governments," MNN must be a state actor. Pet.App.14. To be clear, the court did not apply the "exclusive public function" test, the "compulsion" test, the "joint action" test, or any other test this Court has endorsed. Instead, it concluded that anyone who operates a forum that, if operated by the government, would be a "public forum," is *ipso facto* a state actor, provided there is at least some ostensible connection between the actor and the government—even when that connection is not enough to satisfy any of the "state actor" tests this Court has endorsed. *See* Pet.App.23-26 (Jacobs, J., dissenting in part).

Respondents implausibly read the Second Circuit majority as applying the "exclusive public function" test. BIO.22 ("[T]his was a public-function analysis."). Judge Lohier, in his concurrence, expressly disagreed with that characterization of the majority opinion that he joined; he noted that the majority "might *also* rely on the public function test to conclude that MNN and its employees are state actors," not that it had actually done so. Pet.App.19 (emphasis added). But in all events, the "exclusive public function" test, if applied correctly, is no help to respondents.

Respondents, like the decision below, would begin the analysis with the public-forum question, asking whether public-access channels *would be* a public forum *if* they were operated by the government. Respondents (unsurprisingly) would answer that question affirmatively, and would then plug that answer into the "exclusive public function" test. In other words, they would conclude that public-access channels *would be* a public forum *if* they were operated by the government, and then would reason that MNN must be a state actor because the "regulation of a public forum is a public function." BIO.21.

That circular reasoning mistakenly assumes that it is the nature of the forum, not the nature of the party operating it, that determines whether the First Amendment applies. The First Amendment does not protect "public forums" in the abstract; it protects "public forums" when they are *run by the government*. Accordingly, public-forum doctrine is not concerned with protecting everything that is operated as a place for public discussion and debate, but with protecting

*government-run* places for public discussion and debate, as a means of enforcing the First Amendment against the government. Indeed, the whole point of the public-forum doctrine is to assess the validity of "restrictions that *the government* seeks to place on the use of *its* property." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (emphasis added). There is no such creature as a privately owned and operated "public forum." That is why it is essential to *first* decide whether the person running the forum can be treated as the government before deciding whether the forum is a "public forum." Declaring someone a state actor because they open their property to the public is a complete non-sequitur, and misapprehends the role of public-forum doctrine in enforcing the First Amendment.

In fact, declaring someone a state actor because they open their property to the public would create all manner of perverse incentives, as private parties will be loath to open their property to public use if doing so converts them into *de facto* state actors. A property owner's decision to operate its private property as an open forum for speech and assembly (like a campus quadrangle or social media website) should be encouraged, not used as justification to subject that person to potential constitutional liability under §1983. *See Denver Area*, 518 U.S. at 737 ("[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech."). Deciding whether a forum for speech is a constitutional public forum before first deciding whether the owner and operator of that forum is the government is thus not

only incoherent as a doctrinal matter, but misguided as a policy matter.

The upshot is that the "exclusive public function" test must be applied *before* the public-forum test. The relevant question thus cannot be whether *operating a public forum* is an exclusive public function, but whether *operating a public-access television channel* is a function that historically has been "exclusively reserved to the State." *Flagg Bros.*, 436 U.S. at 168. It is only if the answer to that question is *yes* that public-forum analysis can coherently be applied. And as petitioners persuasively demonstrate, Petr.Br.43-46, the answer to the "exclusive public function" test is *no*: "The provision of cable television generally—or public access channels in particular—is not a function traditionally [or exclusively] provided by government." Petr.Br.43-44.

## II. MNN's Public-Access Channels Are Not Public Forums Because They Are Private Property.

As discussed, this Court can resolve this case without reaching the public-forum question—and, in fact, deciding whether someone is a "state actor" by reference to whether that person is operating its property like a public forum would read the state-action requirement right out of the law. *See supra*. But to the extent this Court endeavors to resolve whether public-access channels are designated public forums, this Court should conclude that they are not, as the government may not designate *private* property as a *public* forum. Indeed, to do so would create takings problems of the first order.

As the Second Circuit recognized, public-access channels are private, not government, property. *See* Pet.App.12. While cable operators typically must request and obtain local franchises or state authorization from government authorities to install the cable needed to reach subscribers, the cable itself ordinarily remains the property of the cable operators. The channels that are transmitted through those privately owned cables thus "belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." *All. for Cmty. Media v. F.C.C.*, 56 F.3d 105, 122 (D.C. Cir. 1995) ("*ACM*") (en banc)*, aff'd in part, rev'd in part sub nom. Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996).

The fact that cable infrastructure is *privately* owned, combined with the fact that *private* public-access centers like CAN TV are entitled to the exclusive use and control of designated cable channels, should settle the public-forum question. "The public forum doctrine is a rule governing claims of a right of access to *public property*, and has never been thought to extend beyond property generally understood to belong to the government." *Denver Area*, 518 U.S. at 827 (Thomas, J.) (concurring in the judgment in part and dissenting in part) (emphasis added)). A public forum "is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee." *ACM*, 56 F.3d at 121. Rather, a

"'public forum,' or even a 'nonpublic forum,' in First Amendment parlance is government property." *Id.*

Sure enough, every single one of this Court's "public forum cases has involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum." *Denver Area*, 518 U.S. at 828 (Thomas, J.); *see also, e.g.*, *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018) ("government-controlled property set aside for the sole purpose of voting"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) ("school property"); *Lee,* 505 U.S. at 681 ("publicly owned airport"); *United States v. Kokinda,* 497 U.S. 720, 723 (1990) ("postal sidewalk" that "lies entirely on Postal Service property").[3]

Likewise, when this Court has spoken of public forums more generally, it has made clear that they arise only on government property. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) ("[A] designated public forum … exists where *government property* that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." (emphasis added)); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) ("[A] government entity may create a designated public forum if *government property* … is intentionally opened up for that purpose." (emphasis added)); *United States v. Am.*

[3] The only possible exception is *Marsh v. Alabama*, 326 U.S. 501 (1946), but as petitioners explain, Petr.Br.32-34, that case does not have precedential force outside of its unique context.

*Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) ("To create such a forum, the government must make an affirmative choice to open up *its property* for use as a public forum." (emphasis added)).

In their brief in opposition, respondents falsely claimed that in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985), this Court "held" that "'private property dedicated to public use' can be a public forum." BIO.27 (quoting *Cornelius*, 473 U.S. at 801). This Court "held" no such thing. *Cornelius* did not even involve private property, let alone "private property dedicated to public use." The forum in *Cornelius* was the Combined Federal Campaign ("CFC"), which is "an annual charitable fund-raising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees." 473 U.S. at 790. The Court held that the CFC was a "nonpublic forum" and that there was no First Amendment violation. *Id.* at 805, 813. Because there was no private property at issue, the Court had no reason to (and did not) issue any "holding" about whether the government can designate *private* property a public forum.

The language that respondents quoted from *Cornelius* was a passing remark about how to define the relevant forum in any given case: "Although petitioner is correct that as an initial matter a speaker must seek access to public property *or to private property dedicated to public use* to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue." *Id.* at 801 (emphasis added); *see Denver Area*,

518 U.S. at 827 (Thomas, J.) (referring to passage as "dictum"); *ACM*, 56 F.3d at 122 (same).

That passage is not just dictum, but particularly strange dictum because the only cases that previously used language about "private property dedicated to public use" actually *rejected* any such doctrine. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the plaintiffs argued that the private property of a large shopping center was a public forum. They claimed that because the shopping center had sidewalks and streets that were "functionally similar to facilities customarily provided by municipalities," it had "been dedicated to certain types of public use" and thus should be treated as a public forum. *Id.* at 568-69. This Court *rejected* that argument, holding that "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Id.* at 569; *see Hudgens v. NLRB*, 424 U.S. 507, 520 (1976) (quoting and reaffirming passage from *Lloyd*).

In all events, even if private property dedicated to public use could be a public forum, that would be only because it had been formally dedicated to public use—*i.e.*, because the government had acquired a property right. *See* Black's Law Dictionary (10th ed. 2014) (defining "dedication" as "[t]he donation of land or creation of an easement for public use"). In such a case, it would be "that government-owned property interest that may be designated as a public forum." *Denver Area*, 518 U.S. at 828 (Thomas, J.). Indeed, while this Court has recognized that property in which the government has a leasehold or less-than-fee-simple interest can be a public forum, *see Se.*

*Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (privately owned theater under long-term lease to the city), it has declined to treat as a public forum private property over which the government has *control* but no formal property rights, *see Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981) (mailboxes of private homes).

None of this is to say that a State could not *acquire* an easement (or some other property interest) over a cable operator's public-access channels and then designate that easement as a public forum. But to do so, the government would have to negotiate with the cable operator to purchase an easement, include the grant of an easement in the terms of its franchise agreements, or exercise its eminent domain power. The government would be constrained in all three circumstances—respectively, by market forces, by this Court's unconstitutional conditions doctrine, *see Dolan v. City of Tigard*, 512 U.S. 374, 385-86 (1994), or by the requirement to pay "just compensation," *see United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951). It cannot, however, do what respondents say it did here—*i.e.*, not acquire any property interest and then simply declare that someone else's property is a public forum. To do so would be to simply declare an easement over the cable operator's public-access channels, which would "obvious[ly]" be a taking. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *cf. id.* ("To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest … is to use words in a manner that deprives them of all their ordinary meaning.").

Here, respondents have not alleged or argued that the government acquired or otherwise obtained any property right in MNN's public-access channels. Accordingly, the government cannot designate those channels as public forums.

## III. The Decision Below Does Not Accord With The Realities Of Public-Access Television And Would Impose Unwarranted Burdens On Public-Access Operators.

As previously noted, CAC is steadfastly committed to fostering and supporting freedom of speech and freedom of expression, and does not have a policy of censoring the content of its producers. *See, e.g.*, CAN TV Access User Manual §IV.A, available at https://bit.ly/2SASBa6 ("CAN TV does not discriminate [on the basis of content]."). CAC's participation as *amicus* in this case is not driven by any desire to restrict content or restrain speech. Indeed, CAC's express mission is to provide Chicagoans a forum to exercise their "freedom of speech by providing technical training, equipment, facilities and programming opportunities on Chicago's public access television channels." *Id.* at 1.

That said, CAC strongly disagrees with the Second Circuit's decision, which improperly treats public-access channel operators as state actors and would impose stringent constitutional restrictions on their operations. That decision is divorced from the realities of public-access television and, if affirmed, would unduly interfere with CAC's operations and limit its ability to provide ordinary, work-a-day Chicagoans with an otherwise unattainable digital media platform to engage with their community.

CAC could very well be classified as a state actor subject to constitutional constraints under the test the Second Circuit applied below. As petitioners explain, the decision below essentially "amounts to a *per se* declaration that all public access channels … are constitutional public fora, regardless of the type of operator or the nature and degree of government involvement with the channel or the operator." Petr.Br.35. The only qualification to that *per se* rule was that it would apply "only" to public-access channels that are authorized by federal law, mandated by state law, and designated by a franchise authority. Pet.App.13-14. But as petitioners accurately note, that describes almost all public-access channels in almost every state. Petr.Br.35. For example, public-access television in Chicago is authorized by federal law, *see* 47 U.S.C. §531(b) mandated by municipal law, *see* Chi., Ill. Mun. Code ch. 4-280, art. VII, §320, and operated by CAC pursuant to a designation by the city, *id.* §310.

Classifying MNN or CAC as a state actor would not accord with the on-the-ground realities. CAC in particular is not the government. CAC is not a branch or extension of local, state, federal, or any other government. It is not a "sister agency" of any branch of government. None of the members of its Board of Directors is appointed or controlled by any government official. The majority of its employees are members of a *private*-sector labor union. CAC is not funded by any government entity; rather, it derives its revenue directly from private cable operators and a video service provider (AT&T) and occasional nominal contributions from small private donations. This clear line of demarcation between CAC and the government

is no accident: The Chicago Municipal Code strictly forbids CAC from "[p]ermit[ting] operation of its channels to be subject to direct or indirect governmental interference with or control of program content." Chi., Ill. Mun. Code ch. 4-280, art. VII, §370(2).

Similarly, classifying public-access channels as "public forums" in the *constitutional* sense would ignore the very real differences between public streets and public parks on the one hand, and public-access channels on the other. For one thing, when the government administers a public park or allows picketers onto public streets, it has no interest or obligation to ensure that the speech or expressive message is interesting, relevant, or in any other sense pleasing to the audience. It thus makes perfect sense to restrict the government from enforcing any content-based restrictions unless those restrictions are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983); *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

While those strict limitations make sense when applied to governmental entities regulating public streets and sidewalks, they make little sense in the context of public-access television. CAC currently utilizes and operates five cable television channels, which are organized by the predominant type of content each one typically features:

- CAN TV19: Local perspectives, arts, music, sports

- CAN TV21: Live call-in programs, local politics, and education
- CAN TV27: Community news and live event coverage
- CAN TV36: Religious and inspirational programming
- CAN TV42: On-demand information on jobs, housing, health, and more with audio from a non-profit radio station

While CAC does not censor or otherwise restrict the content of any qualified producers, its cablecasting department requires at least enough editorial and managerial discretion to ensure that programs are televised on the proper channel and in the proper time slots. *See* Chi., Ill. Mun. Code ch. 4-280, art. VII, §370(1) (permitting CAC to "allocate … channel space and time … on a reasonable, nondiscriminatory basis"). By exercising its reasonable discretion to optimize programming, CAC enhances the viewer experience, builds its audience base, and ensures that programs will be viewed by receptive and appropriate members of the community.

Subjecting CAC to the strictures of public-forum analysis would cripple its ability to exercise that modest editorial and managerial discretion. Any decision it made about when and where to air a community-submitted program would become fodder for a federal lawsuit, where CAC would be forced to defend its editorial and managerial choices against strict public-forum standards. Adverse court decisions or the *in terrorem* effect of costly litigation (combined with a perennially modest and chronically tenuous

operating budget) could cause grave harm to CAC's ability to operate effectively.

Public-access channels are unlike traditional public forums for the additional reason that "[i]n no other public forum that [this Court has] recognized does a private entity … have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf." *Denver Area*, 518 U.S. at 829 (Thomas, J.). When the government administers a public park or sidewalk, it is not obligated to provide speakers with a microphone or other technical assistance. CAC, on the other hand, does not just cablecast and stream programs. CAC also provides technical training, video equipment, and studio facilities for anyone seeking to produce his or her own programs, as well as production facilities and technical assistance to any qualifying member of the community.

Declaring public-access channels to be public forums thus would impose burdens on private parties that the government itself is not required to carry when it operates a public forum. *See id.* (Thomas, J.) ("[T]he numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum."). And the fact that CAC not only transmits speech but also assists producers in speaking and otherwise communicating to their chosen audiences means that CAC could not function without the ability to reasonably exclude particular individuals from accessing its facilities if those individuals were to threaten the safety of the

workplace or attempt to leverage their physical presence within the facility toward the end of intimidating, bullying, or harassing CAC staff. Treating public-access channels as public forums would undermine CAC's ability to be reasonably selective, set standards of behavior and deportment for its public patrons, and retain discretion to bar anyone it reasonably believes may pose a threat to its employees or workplace.

Finally, however this Court resolves this case, it should do so in a way that accounts for the significant variation among public-access operators and public-access channels across the country. Both petitioners and respondents correctly emphasize that a one-size-fits-all test is inappropriate in this context. Petitioners, for example, point out that "[t]here are over two thousand community PEG stations across the country run by a diverse mix of private nonprofit entities, cable operators, educational institutions, governmental entities, and others." Petr.Br.36. Respondents likewise recognize that different public-access channels operate under different legal frameworks and implement different policies, and that legal analysis under 42 U.S.C. §1983 should accordingly be "context-based." BIO.14-20.

CAC has several characteristics that other operators across the country may not share and that could bear on analyses of whether CAC acts "under color of state law" or whether the channels it operates are subject to the same constitutional restrictions as parks and sidewalks. For example, the separation between CAC and the government is more pronounced than in many other places. As noted, CAC receives *no*

funding from the government and has *no* government-appointed officials or government-appointed representatives on its board. Furthermore, CAC operates in Chicago, one of the nation's largest and most diverse markets. Because of the size of the market and the diversity of producers and viewers, CAC operates five separate channels—and as a result, requires more editorial and managerial discretion than a one-channel operator might need. And, regrettably, CAC operates in a city where the above-mentioned concerns about safety are particularly pronounced.

Those factors and others like them underscore the importance of adopting a standard that can take such differences into account. But no matter the ultimate confines of the test this Court adopts, the answer in *this* case is clear. Where, as here, the government is not the source of authority under which the defendant acted; the defendant is not a "state actor" under any of this Court's tests; and the government does not hold any property interest in the defendant's public-access channel, the defendant cannot be held liable under 42 U.S.C. §1983.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed as to petitioners.

Respectfully submitted,

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