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

BRIEF FOR RESPONDENTS

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GLOSSARY

CAO	Community Access Organization
MNN	Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network
PEG	Public, Educational, and Government

BRIEF FOR RESPONDENTS

INTRODUCTION

New York (unlike most states) has chosen to configure its public access television channels as public forums. The administration of a public forum is a traditional and exclusive public function. As a result, in New York, the government-selected administrator of a government-controlled public access channel is subject to the First Amendment.

First, state and local governments have discretionary authority to designate places as public forums. They do so by intentionally opening a place for individuals to speak. In a public forum, the administrator generally lacks editorial discretion, and the First Amendment protects access to the forum.

New York has structured its public access channels as public forums. By requiring them to operate on a free, first-come, first-served basis, New York precludes its channels from exercising editorial control. Most other states, however, have made a different choice; they allow public access channels to curate content. Those channels are not public forums.

Second, the Constitution governs the performance of traditional and exclusive public functions. Administering a public forum—a task limited to a sovereign or its delegee—is one such function. If a City empowers a nonprofit to serve as gatekeeper to a park or after-hours public classroom space, the First Amendment still applies. The same is true for administering the public forums that are Manhattan's public access channels.

Our position is consistent with private property rights. The City of New York—*not MNN*—owns and controls Manhattan's public access channels. The City created these channels through its franchise agreements, and the City selected MNN to administer them. Critically, the City retains complete discretion to remove MNN as administrator and replace it. MNN performs its administrative role solely at the pleasure of the City. The public access channels are therefore not private in any relevant sense.

The reach of this case is narrow. It does not address public access television where there is no government-imposed first-come, first-served rule. Nor does this case implicate the rights cable companies have in their private distribution systems, the question that divided the Court in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996). And it does not address Internet service or content providers; because only a government can create a public forum, this case does not concern places that *private* actors hold open to the public. The *amici* principally concerned with those issues take no position on the outcome here.

Nor is this case about whether New York acted wisely in designating its public access channels as public forums. Congress provided state and local governments autonomy in structuring public access television. If the New York model succeeds, other localities may follow suit. If it fails, New York can change course. What matters is that local governments are free to decide for themselves whether to configure public access television as a public forum. Petitioners' approach, by contrast, would deny local governments this choice.

STATEMENT

A. Legal background.

1. The First Amendment broadly protects speech in public forums. Traditional public forums are those "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks." *United States* v. *Grace*, 461 U.S. 171, 177 (1983).

A government may also "designate" a public forum by "intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). A designated forum may be either "of a limited or unlimited character." *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). So long as the government chooses to keep a designated forum open, it "is bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983).

2. The First Amendment binds state actors. Sometimes, "an ostensibly private organization or individual" takes an action that "may be fairly treated as that of the State itself." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Since the "Fourteenth Amendment is not [then] to be displaced," the Constitution applies to private action "fairly attributable" to the government. *Ibid.* Critical here is the "public function" analysis (*id.* at 296): "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become * * * subject to its constitutional limitations." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

B. Public access television.

Cable television systems "rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers." *Turner Broad. Sys. Inc.* v. *FCC* (*Turner I*), 512 U.S. 622, 627-628 (1994). Cable systems "make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers." *Id.* at 628.

The building and maintenance of a cable system relies substantially on the use of public property—and the cooperation of local government. That is, "[t]he construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property." *Turner I*, 512 U.S. at 628. A cable system "depend[s] for its very existence upon express permission from local governing authorities." *Ibid.*

Early in cable's history, local governments entered franchise agreements with cable operators. *Denver Area*, 518 U.S. at 788 (Kennedy, J.). From these earliest agreements in the late 1960s and early 1970s arose "local initiatives" that resulted in public, educational, and government access television. *Ibid.*

Beginning with the Cable Communications Policy Act of 1984, Congress regulated certain aspects of cable franchises. Congress provided that "cable operator[s] may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1). These agreements serve to "authorize the construction of a cable system over public rights-of-way" and "through easements." *Id.* § 541(a)(2).

While establishing some federal policies governing cable systems, Congress retained local autonomy with respect to public access, educational, and government television—often called PEG channels. In 1984, recognizing that "almost all recent franchise agreements" provided for public access, Congress "continued the policy of allowing cities to specify in the cable franchises" requirements for public access. H.R. Rep. No. 98-934 (1984), 1984 U.S.C.C.A.N. 4667. Congress noted that public access channels are an "electronic marketplace of ideas"—"the video equivalent of the speaker's soap box," "available to all, poor and wealthy alike." *Id*. at 30, 36.

Congress provided that local governments, in exchange for access to public rights-of-way, "may require * * * that channel capacity be designated for public, educational, or governmental use" when they extend cable franchises. 47 U.S.C. § 531(b). In *Denver Area*, the plurality explained that "the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land." 518 U.S. at 760-761.

Local governments may structure public access television in a variety of ways. While many channels are administered by "a nonprofit organization," others are run by the municipality or the cable company itself. *Denver Area*, 518 U.S. at 761 (plurality).

C. Public access in New York.

1. The State of New York has created a unique legal framework for public access television. New York, unlike most other states, requires its public ac-

cess channels to operate on a first-come, first-served basis.

State law obligates local governments to establish a public access channel when issuing cable franchises to operators with more than 36 channels. N.Y. Comp. Codes R. & Regs. (N.Y.C.C.R.R.) tit. 16, §§ 895.1(f), 895.4(b)(1). The public access channels must operate "without charge to the user." *Id.* § 895.4(c)(6).

State law specifically requires that "[c]hannel time shall be scheduled on the public access channel by the entity responsible for the administration thereof" on "a first-come, first-served, nondiscriminatory basis." 16 N.Y.C.C.R.R. § 895.4(c)(4). The cable franchisee "shall not exercise any editorial control"—unless the material is "obscenity or other content unprotected by the First Amendment." *Id.* § 895.4 (c)(8). Likewise, a "municipality shall not exercise 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).

To enable transparency, the "entity responsible for the administration of a public access channel" must record "the names and addresses of all persons using or requesting the use of any such channel," and it must make this information "available for public inspection for a minimum of two years." 16 N.Y.C.C.R.R. § 895.4(c)(10).

2. New York City established public access channels in Manhattan pursuant to this framework.

Manhattan public access television predates MNN. The first stations were established in the early 1970s. See Lisa Belkin, *Public Access TV: Behind*

the Scenes, N.Y. Times (Apr. 13, 1987). Later, New York City transferred administration of the Manhattan-area public access channels to MNN. JA22-23.[1]

The "2008 Cable Franchise Agreement by and between The City of New York and Time Warner Entertainment Company, L.P." (Franchise Agreement) provides for a minimum of six channels for public access. Franchise Agreement §§ 8.1.1, 8.1.3.[2] Time Warner agreed to carry these channels to every customer. *Id*. § 8.1.6(a).

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[1] On April 12, 1991, acting in his official capacity, Deputy Manhattan Borough President Derek Johnson incorporated MNN. See Certificate of Incorporation of Manhattan Community Access Corporation. In a press release, the City announced that "Manhattan Borough President Ruth Messinger appointed a seven-member initial board of directors." *Messinger Announces Formation of Community Access Organization to Administer Public Access Cable Channels* (May 16, 1991). Since then, at least two of MNN's board members are selected by the Borough President (Pet. App. 37a), who is herself a non-voting, *ex officio* member. See *MNN Staff*, MNN, perma.cc/A2VX-7QUF.

[2] New York City has posted the Franchise Agreement and the Community Access Organization (CAO) Agreement online. See perma.cc/UTP3-JW2Q (Franchise Agreement); perma.cc/63EZ-VYHY (CAO Agreement). For the Court's convenience, relevant passages are excerpted in the attached appendix.

The amended complaint cited to and quoted from both documents. See, *e.g.*, JA22-23. The courts below identified them in resolving this case. See, *e.g.*, Pet. App. 4a-5a, 37a. Petitioners cite to them, too. See, *e.g.*, Pet'rs Br. 7. They are therefore properly considered here. See *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (courts deciding a motion to dismiss may consider "documents incorporated into the complaint by reference").

In the Franchise Agreement, the City and Time Warner agreed that the Manhattan Borough President (a New York City official) would "designate[]" a "nonprofit corporation" as the "Community Access Organization" (CAO) to administer the public access channels. Franchise Agreement § 1.18. See also *id.* § 8.1.8. The agreement between the CAO and Time Warner was part of the Franchise Agreement itself; it was "attached as Appendix C to this [Franchise] Agreement." *Id.* § 8.1.8. Moreover, the City and Time Warner agreed that the CAO must abide by "the rules and regulations of the NY [Public Service Commission], and applicable law." *Ibid.*

Through the Franchise Agreement, the City obligated Time Warner to make multi-million-dollar annual payments to the CAO. See Franchise Agreement §§ 8.2, 8.3. In this way, the City funds the CAO through mandatory payments imposed on cable operators.

The City has designated petitioner MNN as the "Community Access Organization" for Manhattan. MNN accordingly entered into the "CAO Agreement," as attached to the Franchise Agreement. See Pet. App. 37a; JA23 (identifying and quoting from CAO Agreement); App., *infra*, 24a-35a (relevant provisions of CAO Agreement).

The CAO Agreement identifies that MNN "has been designated by the Borough President as the CAO to receive such grants." CAO Agreement, at 2. It recounts that "the Franchise Agreement requires Time Warner Cable to make available * * * public access channels" and to provide "support payments and Cash Grants." *Ibid.* The CAO Agreement runs through the duration of the "Franchise Agreement,"

"*provided that* the designation of the CAO by the Borough President *remains in effect*." *Id.* § 5.1.02 (emphasis added). The CAO Agreement therefore recognizes the Manhattan Borough President's discretion to change designation of the CAO.

This agreement, moreover, details the multi-million-dollar annual payments that the City obligates Time Warner to make to MNN. First, Time Warner must pay MNN each month a per-subscriber amount: The fee began at $0.90 per subscriber, and it escalated to $1.30. CAO Agreement § 2.1.02. Additionally, the agreement requires Time Warner to make a series of cash grants to MNN, totaling $4.5 million. *Id.* § 2.2.

The CAO Agreement incorporates "all applicable local, state, and federal laws with respect to program content on the Public Access Channels" (CAO Agreement § 4.1), which includes New York's "first-come, first-served" law (16 N.Y.C.C.R.R. § 895.4 (c)(4)). Indeed, the CAO Agreement specifically obligates MNN to "maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law." CAO Agreement § 3.3.01. See also Pet. App. 37a.

Reflective of the governing legal structure, MNN has long stated that its "mission" is to "ensure the ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." Pet. App. 37a.

D. Factual background.

1. Respondents DeeDee Halleck and Jesus Papoleto Melendez were longtime public access producers in Manhattan. JA24.

Halleck is Professor Emerita of Communication at the University of California at San Diego; she is the author or editor of several books about public access television, including *Hand-Held Visions: The Uses of Community Media* and *Public Broadcasting and the Public Interest*. Halleck's 1965 film *Mural on Our Street* was nominated for an Academy Award for Best Documentary Short. Halleck formed Paper Tiger Television in 1981 to produce public access content. In 1989, she received a Guggenheim Fellowship for her work in public access. Halleck advocated for the creation of MNN in the early 1990s, and, through Paper Tiger TV, she had produced content for the channel since its creation. JA24; JA38.

Melendez is a poet and playwright. He is the author of several volumes of poetry, including *Casting Long Shadows*, *Street Poetry & Other Poems* and *Concertos on Market Street*. His work has been featured in *The Norton Anthology of Latino Literature*. *The New York Times* identified him as one of the "founders of the Nuyorican Poetry movement," calling him a "[p]oet and [p]rophet of El Barrio." David Gonzalez, *Poet and Prophet of El Barrio May Soon Be a Pauper*, N.Y. Times (Feb. 8, 2013).

Melendez was a regular contributor of content to MNN since the mid-1990s. JA24. He "assist[ed] youth and senior citizens at the University Settlement in East Harlem in producing" programming. *Ibid*. An MNN executive, Iris Morales, had invited Melendez to join its Community Leadership Program

to train him for the creation of content for MNN. JA25.

2. The events underlying this case followed MNN's refusal to air speech concerning its cancellation of community media grants.

Using funds received from cable operators, MNN had long issued grants to promote community media. Between 1992 and 2004, MNN awarded approximately three million dollars in grants to more than 70 diverse organizations. Rick Jungers, *MNN's Community Media Grants*, J. of Alliance for Community Media (2004), perma.cc/VR5P-CJPU. Rick Jungers, then the director of community media for MNN, explained that, "[t]hrough the Community Media Grant, [MNN] works and partners with Manhattan nonprofit and grassroots organizations to use media to facilitate community dialog, foster local artistic and cultural expressions, provide local perspectives in areas of the public interest, facilitate a more media literate community, and develop a community media infrastructure." *Ibid*.

Yet, in the fall of 2008, contemporaneous with MNN executives' taking massive pay raises, MNN summarily terminated the community media grant program, citing "financial difficulties." See *The Grant Program*, Take Back MNN Campaign, perma.cc/KB8F-PQDV. See also *MNN's 4 Top Executives Earn over 600k a Year*, Take Back MNN Campaign (Jan. 6, 2015), perma.cc/3WUS-ET9W. In 2004, MNN's executive director earned $107,124 in compensation and benefits. 2004 Form 990, perma.cc/ND52-QXUB. The next five highest-paid employees at the time had compensation and benefits totaling $302,409 (an average of $60,481 each). *Ibid*. By

2009—when MNN terminated the grants—the executive director's total compensation had almost doubled, to $195,534. 2009 Form 990, perma.cc/FYT9-ZG2C. The next two highest-paid employees received total compensation of $276,402 (an average of $138,201). In 2012, the executive director's total compensation had ballooned to $255,148. 2012 Form 990, perma.cc/2H4C-YA23.[3]

Respondents and other producers objected to MNN's decision to increase compensation so sharply for nonprofit executives while simultaneously ending the community media grants. As one blog post put it after recapping the relevant salary information, "Wonder where the new cameras and community media grant program went? * * * Now you know." *MNN's Tax Forms*, Take Back MNN Campaign (May 24, 2011), perma.cc/6EQF-EZJ3. Another post decried the increase to executive compensation in 2009, "the same year MNN killed the community media grant program." *Is This What Community Media Looks Like?*, Take Back MNN Campaign (May 24, 2011), perma.cc/TJ9L-2Y6W.

3. In December 2011, respondent Halleck, along with other public access producers, attempted to attend an MNN board meeting "to urge the MNN Board to reinstate" the "community media grant program." JA25. MNN's executive director, petitioner Coughlin, informed Halleck that, notwithstanding

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[3] The nonprofit executive director's compensation has continued to skyrocket. Three years later, in 2015, his total compensation reached $406,999. 2015 Form 990, perma.cc/U27M-V7F6. Over an 11-year span, total compensation MNN paid its executive director grew nearly fourfold. MNN has not, however, reinstated its community media grant program.

MNN's bylaws that require public meetings, the board meeting was closed to the public. *Ibid.*

On February 28, 2012, Halleck emailed petitioner Coughlin, requesting permission for her and respondent Melendez to speak at the March 2012 board meeting. JA26. Coughlin agreed. *Ibid.* On March 14, 2012, Halleck brought a video camera to the meeting. *Ibid.* Once Halleck began taping, Coughlin "abruptly ended the meeting and adjourned." JA27.

That same night, Melendez was at the MNN facility to participate in the Community Leadership Program. JA25-26. After having briefly attended the board meeting to lodge his protest, he returned to the Leadership Program. JA26-27. MNN employee Morales then called Melendez out of the Leadership meeting and labeled him a "traitor" for having joined with Halleck in protesting MNN's termination of the community media grants. JA27; Pet. App. 38a. MNN subsequently dismissed Melendez from the Leadership Program. Pet. App. 38a. He surmised "that the real reason for withdrawing the invitation was because Melendez had attended the MNN board meeting, which Halleck videotaped." *Ibid.*

In July 2012, MNN held an event to celebrate the opening of the new El Barrio Firehouse Community Media Center. Pet. App. 38a. Because MNN did not allow Halleck or Melendez inside, they stood outside on the sidewalk, interviewing attendees as they entered. *Id.* at 38a-39a.

With that footage, respondents produced a 25-minute video that criticized MNN for its conduct. At one point, the screen displays the message that, "[b]ecause [Melendez] showed an interest in attend-

ing the MNN board meeting, he was removed from the class and harshly reprimanded." *The 1% Visits El Barrio; Whose Community* (2:50). In the video, Melendez explains that MNN took adverse action against him because he had "issues against the board of directors" (*id.* at 17:36-17:57)—the "issues" were respondents' complaints regarding the community media grants.

During the filming, Joseph Figueroa, Morales' boyfriend, arrived. Pet. App. 39a. "When Halleck asked him to comment about public access, Figueroa responded, 'Don't f--- with me.'" *Ibid.* "When Melendez responded, 'Hey f--- you,' Figueroa rushed at him." *Ibid.* Security had to hold Figueroa back from striking Melendez; MNN nonetheless allowed Figueroa to attend the event. JA30.[4]

Following this incident, Melendez made a comment regarding race and class, noting that the security guard precluding him from entering was a minority. MNN subsequently argued that this comment amounts to an aggravated threat:

> You know what's funny? I got to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facili-

[4] Petitioners do not explain how their treatment of Figueroa—who was videotaped assaulting Melendez but received no suspension (JA30-32)—comports with "MNN's zero tolerance policy on harassment." Pet'rs Br. 10.

> ty here. Because I am being locked out by people of color. There's irony for you.

Pet. App. 39a.

Halleck and Melendez submitted this video to air on MNN. Pet. App. 5a-6a. MNN ran it once in October 2012, but shortly thereafter banned it from the network. *Id.* at 6a. MNN maintains that Melendez's comment that he could not access the building until the guards at the door are "fired, or they retire, or someone kills them" constituted an aggravated threat to MNN staff. *Ibid.*[5]

Petitioners suspended Halleck from submitting content to MNN for one year. Pet. App. 7a.[6] While Halleck's suspension has expired, she is still not permitted to air *The 1% Visits El Barrio* or any other program featuring Melendez. *Id.* at 40a.

MNN suspended Melendez for life. Pet. App. 7a. MNN maintains that it will never again allow Melendez to submit content to the public access channel in his community. *Ibid.*

E. Proceedings below.

Respondents filed suit, seeking injunctive relief.[7] They request an order restoring their right to place

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[5] During the motion hearing, the district court expressed skepticism that Melendez committed harassment: "I've looked at the video. * * * What's so threatening about it?" JA61.

[6] Petitioners contend that, at a chance meeting in July 2013, Melendez "threatened and pushed" Coughlin. Pet. App. 40a. Respondents allege that Coughlin fabricated the alleged physical aggression. JA34.

[7] Although the complaint included a generic claim for damages, respondents subsequently and categorically relinquished

content on Manhattan's public access channels. Respondents allege that petitioners—MNN and three of its employees—engaged in viewpoint discrimination by banishing them. Pet. App. 2a-3a. Respondents assert that MNN's stated reason for issuing their bans is pretext. JA32.

1. The district court dismissed the action. Pet. App. 34a-53a. It agreed "that the regulation of free speech in a public forum is 'a traditional and exclusive public function.'" *Id.* at 45a. The district court therefore concluded that the case turns on whether MNN administers a designated public forum. *Id.* at 46a.

The district court viewed public access channels broadly. Pet. App. 46a-50a. In addressing the legal status of the forum, the district court did not focus on the New York state law requiring first-come, first-served access. Instead, considering public access channels generally, the court observed that whether *all* "public access channels are public fora" "is certainly a close call." *Id.* at 51a. Ultimately, the court concluded that respondents "cannot establish that MNN was operating a public forum." *Id.* at 53a.

2. The court of appeals reversed, holding that "the public access TV channels *in Manhattan* are public forums." Pet. App. 3a (emphasis added). The court focused expressly on the New York law obligating "first-come, first-served nondiscriminatory" access to the channels. *Id.* at 4a. The court concluded that the specific overlay of federal, state, and munic-

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that request: "Plaintiffs withdraw their claim for monetary damages." D. Ct. Dkt. No. 43, at 25.

ipal law rendered Manhattan's public access channels a public forum. *Id.* at 13a-14a.

Because MNN was designated by the City of New York to administer the public forum, its conduct in doing so qualifies as state action. Pet. App. 14a-15a. In particular, the court explained that "[t]he employees of MNN are not interlopers in a public forum; they are exercising precisely the authority to administer such a forum conferred on them by a senior municipal official." *Id.* at 15a.

Concurring, Judge Lohier explained that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Pet. App. 21a. He observed that "MNN's public access channels largely offer 'the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet.'" *Id.* at 20a.

Judge Jacobs dissented in part. Pet. App. 22a-33a. Approaching public access as a whole, he reasoned that a cable channel is not a "power[] traditionally exclusively reserved to the State," nor is it a "function[] of sovereignty." *Id.* at 25a. He did not address New York's first-come, first-served requirement.

SUMMARY OF ARGUMENT

New York (unlike most other states) has chosen to designate its public access channels as public forums. Administering a public forum is a traditional and exclusive public function. Respondents have

thus adequately pleaded that petitioners' challenged conduct was state action.[8]

I.A. People enjoy substantial free speech rights in public forums, including places so designated by state and local governments.

A public forum cannot be created by a private party or by government inaction. Rather, to designate a public forum, the *government* must *intentionally open* the forum for use by the public to speak. The administrator of such a forum generally lacks editorial discretion; if the speaker comports with the rules established for the forum, he or she has a right to speak.

By contrast, where the government creates a structure of *selective* access, there is no public forum. In that kind of place, the administrator retains editorial discretion to choose who will be permitted to speak.

B. The State of New York has chosen to designate its public access channels as public forums. State law requires those channels to operate on a first-come, first-served basis. They are free of charge and free of editorial control. New York has thus made its public access channels generally open to the public.

New York law is unique. Most other states have made different choices; they do not impose a first-come, first-served rule on public access channels. In those jurisdictions, public access administrators may

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[8] Because this case arises on a Rule 12(b)(6) motion to dismiss, respondents' factual allegations are assumed true. *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2005 (2017).

exercise editorial control. These "selective access" regimes are not public forums.

C. Manhattan's public access channels are owned by the City, not MNN.

Petitioners assert, without explanation, that they own the relevant forum. They therefore contend that our argument requires accepting the premise that a public forum may be established on private property.

Petitioners are mistaken. The City—*not MNN*—owns the relevant rights. The City's contracts with the cable operators created the public access channels in Manhattan. Those contracts entitle the City to select the channels' administrator. The City chose petitioner MNN. But the City has express authority to remove MNN and replace it with another organization. MNN's tenure as administrator of Manhattan's public access channels is thus at the pleasure of the City. Because the City ultimately controls the public access channels, it was proper for the government to designate them as public forums.

The issues here are different from those in *Denver Area*. In that case, there was a conflict between the cable operator's rights to its private cable distribution network and the programmers' rights to place content onto that network. Because of that conflict, the opinions considered whether the *cable distribution system* was a public forum.

Here, there is no claim by or against a cable operator. As all agree—including the principal association that advocates on behalf of cable operators—the rights of cable operators are not at issue. The question is whether the *public access channels* are public forums. In New York, they are.

D. Congress has allowed state and local governments to make various choices about how to configure public access channels. New York has chosen to create venues for the exercise of First Amendment rights—a decision that enhances its citizens' freedoms. Petitioners, by contrast, seek a one-size-fits-all rule that would shackle local authority.

The question posed in this case is not whether New York's choice to structure public access television as a public forum is good policy. That is a decision for New York to make. Indeed, if New York ever dislikes the consequences of its decision, it can change course.

In any event, the First Amendment allows substantial leeway in the design of neutral time, place, and manner restrictions. For instance, although the Court has long held that school facilities opened to the public qualify as public forums, there has been no judicial micromanagement of schoolhouse meeting times. Instead, courts simply (and properly) enforce the rule that schools may not discriminate against disfavored groups and messages. The same is also true for public access channels that the government designates as public forums.

E. As several *amici* underscore, the issue posed here is narrow. This case does not address public access television in states that have made different choices. It does not implicate the rights of cable operators. And it says nothing about the Internet.

If a government did attempt to designate a public forum on private property, that would raise complex questions regarding the Takings Clause and compelled speech. But, because Manhattan's public access channels are owned and controlled by the City,

those issues are not present here. Indeed, petitioners have never raised them.

II.A. "Public functions" are a limited category of activities that states have traditionally and exclusively performed. They reflect an exercise of sovereignty. When a state delegates a public function to a nominally private entity, the Constitution continues to apply.

B. The administration of a public forum qualifies as a public function. The Court adopted this rule in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and that holding remains correct. Public forums are created by government action. Once they are created, only the government has the authority to administer them. Absent a delegation of authority by the state, a private entity lacks authority to serve as gatekeeper to a public forum.

C. This conclusion precludes circumvention of the First Amendment. If a city delegates administration of a public park to a nonprofit, the First Amendment still governs the approval of demonstration permits. Likewise, a school district cannot evade *Good News Club* by designating a private entity to administer school facilities.

ARGUMENT

I. New York has chosen to designate its public access channels as public forums.

New York—unlike most other states—has designated its public access channels as public forums. It has done so by adopting a first-come, first-served rule that precludes the channels from exercising editorial discretion.

New York's designation of its public access channels as public forums accords with the underlying property rights. Municipalities create the public access channels in that state, and they determine who administers them. Relevant here, while New York City has chosen MNN to administer Manhattan's public access channels, the City retains sole discretion to remove MNN. MNN is wrong to assert that it possesses some ownership interest in the channels.

To be clear, only intentional *government* action can create a public forum. Public forums are not established by private parties or through government inaction. And constitutional safeguards would apply if a government sought to impose a public forum on private property. That is why several *amici* concerned with the potential application of the First Amendment to private businesses are neutral as to the outcome of this narrow dispute. See, *e.g.*, Internet Ass'n Br. 15-21 (arguing against application of the First Amendment to private Internet companies); EFF Br. 10-18 (describing First Amendment interests of private entities); NCTA Br. 4-17 (advocating for cable operators' First Amendment rights); Chamber Br. 6-18 (arguing that privately-owned forums are not subject to the First Amendment). As these briefs confirm, respondents' position is fully compatible with protecting businesses' private property rights.

A. State and local governments possess discretion to designate public forums.

Public forums are "places which by long tradition *or by government fiat* have been devoted to assembly and debate"; in these places, "the rights of the state

to limit expressive activity are sharply circumscribed." *Perry*, 460 U.S. at 45 (emphasis added).

1. Traditional public forums are places like "streets and parks" that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry*, 460 U.S. at 45 (quoting *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J.)).

In a traditional public forum, "[r]easonable time, place, and manner restrictions are allowed," but "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). And "restrictions based on viewpoint are prohibited." *Ibid.*

2. "In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public." *Cornelius*, 473 U.S. at 802. A designated forum may be either "of a limited or unlimited character." *Krishna Consciousness*, 505 U.S. at 678. The designated forum is an unlimited one if it is designated "for use by the public at large for assembly and speech," and it is a limited forum if it is designated "for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802.

School facilities purposefully opened to the public often qualify as public forums. See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). So do public university

programs open to at least some range of speakers. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). The municipal theater in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975), was likewise a public forum.

If the forum is unlimited, its regulation "is subject to the same limitations as that governing a traditional public forum." *Krishna Consciousness*, 505 U.S. at 678. While "a state is not required to indefinitely retain the open character of" a designated public forum, the forum "is bound by the same standards as apply in a traditional public forum" so long as it remains open. *Perry*, 460 U.S. at 46.

Alternatively, a government may designate a "limited" public forum by opening a forum "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 555 U.S. at 470. In these places, "the constitutional right of access" "extend[s] only to other entities of similar character" to those allowed to access the forum. *Perry*, 460 U.S. at 48. In such a limited public forum, "[a]ny access barrier must be reasonable and viewpoint neutral." *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 679 (2010).

"The government does not create a public forum by inaction." *Cornelius*, 473 U.S. at 802. "Designated public fora * * * are created by *purposeful* governmental action." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677 (1998) (emphasis added).

3. In assessing whether a government has designated a place as a public forum, the Court considers the forum's structure and nature.

Structure. For a forum to qualify as a "designated public forum, whether of a limited or unlimited character," a government must have "opened [the forum] for expressive activity by part or all of the public." *Krishna Consciousness*, 505 U.S. at 678. That is, the forum must be "generally open" to at least some class of speakers. *Widmar*, 454 U.S. at 267. This is often referred to as a structure of "general access." *Cornelius*, 473 U.S. at 803.

In a public forum, the administrator cannot impose editorial control beyond the structure of the forum itself. Because an unlimited public forum lacks any structural, state-imposed limitations, the administrator cannot exercise any editorial control. See *Summum*, 555 U.S. at 469-470. In a limited public forum, the administrator may restrict the range of speakers or the range of topics to those within the scope of the limited forum, but the administrator cannot exercise additional control. *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, * * * the State must respect the lawful boundaries it has itself set.").

By contrast, a "selective access" regime is not a public forum. *Perry*, 460 U.S. at 47. "A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Arkansas Educ. Television*, 523 U.S. at 679. Instead, where a speaker must first "obtain permission," the government has editorial control. *Cornelius*, 473 U.S. at 804. A license plate is not a public forum, for example, because "the State exercises final authority over each specialty license plate design." *Walker* v. *Texas*

Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2251 (2015).

Nature. The Court also considers "the nature of the property and its compatibility with expressive activity" to help "discern the government's intent." *Cornelius*, 473 U.S. at 802. A public forum is typically a place that has as "a principal purpose * * * the free exchange of ideas." *Id.* at 800.

The Court has repeatedly confirmed that a public forum need not be physical space. It may be "a place *or channel of communication*." *Cornelius*, 473 U.S. at 802 (emphasis added). A public forum includes communication channels that are more "metaphysical than in a spatial or geographic sense." *Rosenberger*, 515 U.S. at 830. The "same principles" of public forum analysis are thus "applicable" to a student activity fund (*ibid.*), a school mail system (*Perry*, 460 U.S. at 46-47), the Combined Federal Campaign (*Cornelius*, 473 U.S. at 801), and advertising space on city buses (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 300 (1974)).

B. New York—unlike most other states—has designated its public access channels as public forums.

1. New York has chosen to designate its public access channels as public forums.

Structure. New York law structures its public access television channels as "generally open" to the public.

State law mandates that New York's public access channels operate on a "first-come, first-served" basis, so administrators are not granted editorial control. 16 N.Y.C.C.R.R. § 895.4(c)(4). Moreover,

"[c]hannel time for PEG access programming shall be without charge to the user." *Id.* § 895.4(c)(6). To make the public aware of this forum, petitioners must periodically transmit messages "to the general public of the opportunity to use such channel." *Id.* § 895.4(c)(3).

A "municipality shall not exercise any editorial control over any use by the public of a public access channel except as may be permitted by law." 16 N.Y.C.C.R.R. § 895.4(c)(9). Nor can anyone else exercise "any editorial control"—unless the "content" is "unprotected by the First Amendment." *Id.* § 895.4(c)(8).

In the district court, petitioners admitted that New York's "nondiscriminatory regulation" precludes it from engaging in any "viewpoint-based discrimination." JA60. MNN acknowledges that state law precludes it from banning content because it "criticized MNN." JA59. This is the hallmark of a public forum: New York law opens the state's public access television platform to the public, and, as MNN concedes, state law *forbids* it from exercising additional editorial control.[9]

New York has thus purposefully "opened" its public access channels "for expressive activity by part or all of the public." *Krishna Consciousness*, 505 U.S. at 678. MNN is "generally available" to the public. *Widmar*, 454 U.S. at 264. MNN's own mission statement recognizes that MNN exists to "ensure the

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[9] State law bars MNN from editorial discretion, a conclusion that MNN accepts. JA59-60. MNN is therefore unlike traditional news stations, where "editorial staff[s]" exercise "discretion." *Arkansas Educ. Television*, 523 U.S. at 673.

ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." Pet. App. 37a.

In fact, MNN has previously taken the position that it is "a First Amendment forum." See *Denver Area* JA238 (Nos. 95-124 & 95-227). In comments to the FCC, MNN urged "the Commission not to jeopardize the integrity of public access as a First Amendment forum." *Ibid.* See also *id.* at JA235 (identifying MNN's mission as tethered to Manhattan residents' First Amendment rights).

This is analogous to school districts or public universities that have opened their "facilities for use * * * by community groups for a wide variety of social, civic, and recreational purposes." *Rosenberger*, 515 U.S. at 830. See also *Widmar*, 454 U.S. at 267 ("[T]he University has created a forum generally open for use by student groups."). Just as those facilities qualify as public forums once opened to the public, so too does New York's public access television.

Nature. The nature of public access television is entirely consistent with New York's choice to designate it as a public forum.

In *Widmar*, this Court concluded "that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum," partly because "[t]he college classroom" and its "surrounding environs" are "peculiarly 'the marketplace of ideas.'" 454 U.S. at 267 n.5.

Public access channels like New York's are likewise "marketplaces of ideas." Congress itself has identified that public access channels are an "electronic marketplace of ideas"—"the video equivalent

of the speaker's soap box," "available to all, poor and wealthy alike." H.R. Rep. No. 98-934, at 30, 36 (1984). Indeed, MNN's "programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy." Pet. App. 20a (Lohier, J., concurring). Like the theater in *Southeastern Promotions*, a public access channel is "designed for and dedicated to expressive activities." 420 U.S. at 555.

What is more, the Court has previously observed that "[t]here can be no disagreement" on the conclusion that "[c]able programmers * * * engage in and transmit speech." *Turner I*, 512 U.S. at 636. Producers of public access programming, including respondents, likewise "engage in and transmit speech" when they use the forum of public access television.

One final point: We have repeatedly stated that New York's free, first-come, first-served policy is what renders public access channels in that state public forums. See, *e.g.*, Opp. 1-2, 8, 14-19, 24. We explained that petitioners' inability to "assert editorial control over the content aired" is "the calling card of a public forum." *Id.* at 24. Petitioners do not engage our argument; indeed, petitioners disregard New York's first-come, first-served law entirely. Petitioners insist on viewing the relevant question as whether *all* public access channels are a public forum. See Pet'rs Br. 24-37.[10] That is simply not our argument.

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[10] While doing so, petitioners repeatedly suggest that *we* advance a "per se" rule (Pet'rs Br. 5, 20, 34, 35) or "categorical" approach (*id.* at 20, 36). That is incorrect. Our position is governed by the unique features of New York law.

2. New York's free, first-come, first-served, no-editorial-control approach to public access is unusual. To our knowledge, only Hawaii and Rhode Island have comparable first-come, first-served laws. See Haw. Admin. Code § 16-131-32; 815 R.I. Admin. Code § 10-05-1.14.1.

The vast majority of states have no similar requirement.[11] Highlighting that this is a matter of discretion for local governments—and a choice with consequences—Minnesota expressly authorizes 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." Minn. Stat. Ann. § 238.084(1)(z).

Where state or local governments have not imposed a first-come, first-served law with respect to public access television, the administrator of the station may choose to exercise editorial discretion in selecting the content to air. There is no federal law that obligates public access channels to operate on a first-come, first-served basis.

It is little surprise, therefore, that public access channels outside New York *do* engage in editorial cu-

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[11] See, *e.g.*, Ariz. Rev. Stat. Ann. § 9-506(D)(1); Cal. Pub. Util. Code § 5870; Conn. Agencies Regs. § 16-331a-2; Fla. Stat. Ann. § 610.109; Idaho Code Ann. § 50-3010; Ind. Code Ann. § 8-1-34-25; Iowa Code Ann. § 477A.6; Kan. Stat. Ann. § 12-2023; La. Stat. Ann. § 45:1369; Me. Rev. St. Ann. tit. 30-A, § 3010; Mo. Ann. Stat. § 67.2703; Nev. Rev. Stat. § 711.810; N.H. Rev. Stat. Ann. § 53-C:3-a; N.J. Admin. Code § 14:18-15.4; N.C. Gen. Stat. Ann. § 66-357; Ohio Rev. Code Ann. § 1332.30; Okla. Stat. Ann. tit. 11, § 22-107.1; Tenn. Code Ann. § 7-59-309(a); Tex. Util. Code Ann. § 66.009; Va. Code Ann. § 15.2-2108.22; W. Va. Code Ann. § 24D-1-9.

ration. California, for example, lacks a statewide first-come, first-served law. See Cal. Pub. Util. Code § 5870. Consistent with state law, the Los Angeles Cable Television Access Corporation airs only "the 'Best Of' Public Access programming in the City of Los Angeles." *Public Access Guidelines*, L.A. Cable Television Access Corp., 1, perma.cc/JE7W-P87H. An "advisory committee" selects the content deemed "Best Of" on "a quarterly basis." *Ibid.* The content will run only if the committee makes this editorial decision. *Ibid.*[12]

That sort of structure is not "generally open" to the public. *Widmar*, 454 U.S. at 267. Rather, it is the sort of "selective access" regime where a would-be speaker must first ask for "permission." *Perry*, 460 U.S. at 47.

Congress let state and local governments make various choices regarding public access television. One of those choices is whether to render those channels public forums. Some states—New York, Rhode Island, and Hawaii—have done so by intentionally opening the channels to the public. Most other states have not. These different choices warrant respect.

3. Because it makes no difference here whether the public forum is considered limited or unlimited,

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[12] Petitioners point to West Hollywood Public Access. See Cert. Reply 5 n.6. That entity is operated by the City of West Hollywood, so it is necessarily a state actor. See *Public Access Television*, City of W. Hollywood, perma.cc/4ZWK-ULEH. In any event, what matters for the public forum analysis is whether a *government* has chosen to render a forum one that is open to the public. *Arkansas Educ. Television*, 523 U.S. at 677. When a local government makes this choice, it has consequences.

the Court need not address the issue. See *Good News Club*, 533 U.S. at 106 (reserving whether forum is limited or unlimited).

Assuming for the sake of argument that Manhattan public access channels are limited to "certain groups" (*Rosenberger*, 515 U.S. at 829), respondents are within the class of individuals for whom the forum is open. Respondents previously submitted content to MNN, and MNN invited Melendez to participate in a class to train him to provide video for airing. See JA24-26.

Respondents moreover allege that petitioners engaged in viewpoint discrimination: Petitioners disliked the viewpoint respondents displayed in *The 1% Visits El Barrio* and banished them from the public forum for that reason. See JA26-35. In a limited public forum, "viewpoint discrimination * * * is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger*, 515 U.S. at 830.

If the Court does reach the issue, the first-come, first-served requirement creates an unlimited public forum. New York law provides "for use by the public at large for assembly and speech," regardless of the identity of the speaker or the nature of the subject. *Cornelius*, 473 U.S. at 802. But whether the designated public forum is deemed limited or unlimited, respondents' viewpoint discrimination claim remains equally viable.

C. New York's choice is consistent with the underlying property rights.

New York's decision to designate its public access channels as public forums is consistent with the un-

derlying property rights because New York owns and controls the relevant rights.

1. New York City owns and controls its public access channels.

a. Petitioners assert, without explanation, that this case involves "privately-owned and controlled fora." Pet'rs Br. 30-34 (capitalization omitted). That is flatly wrong. MNN serves as administrator of Manhattan's public access channels solely at the pleasure of New York City. The City retains complete discretion to remove MNN as administrator and replace it with another entity. It is the City—*not MNN*—that owns the relevant rights. Because of this public ownership, petitioners' arguments regarding the intersection of public forums and private property (*ibid.*) are not relevant to this case.

Cable systems involve three principal kinds of property rights, only the third of which is relevant here:

i. Cable distribution network rights. Cable operators own their cable distribution networks, which physically transmit cable signals to subscribers' homes and offices. See *Turner I*, 512 U.S. at 628-629. These networks are largely built on public rights-of-way and easements. *Ibid.* Cable operators have property and speech rights with respect to their distribution networks. Those rights were at stake in *Denver Area*, but they are not at issue here.

ii. Content rights. Individual content is typically owned by the producers who create it. There is no dispute regarding content rights in this case.

iii. Content placement rights. This case involves the right to place content on a particular channel.

That right is what gives a cable programmer access to and control over a cable channel.

Cable operators often reach agreements with cable programmers (like ESPN) that provide the programmer access to a particular channel of the cable system. *Turner I*, 512 U.S. at 629. After that relationship is created, the "cable system" becomes a "conduit," "transmitting" the content selected by the programmer "on a continuous and unedited basis to subscribers." *Ibid.*

As required by state law, New York City created public access channels when it entered into franchise agreements with Manhattan-area cable operators. The City's Franchise Agreement with Time Warner, for example, creates at least six public access channels. See, e.g., Franchise Agreement §§ 8.1.1, 8.1.3. The City continues to own and control these channels.[13]

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[13] For purposes of this case, it does not matter if a cable programmer is deemed to "own" a cable channel outright—or to have a long-term interest equivalent to a lease. In *Southeastern Promotions*, Chattanooga had a "long-term lease" to the "privately owned" Tivoli theater. 420 U.S. at 547. The lease gave Chattanooga a content placement right; that is, Chattanooga held the right to select what content would be displayed in the theater, even though it did not own the theater itself. See *ibid.* The Court nonetheless concluded that the theater was a public forum to which the First Amendment applied. *Id.* at 553-555. See *Cornelius*, 473 U.S. at 803. In *Denver Area*, Justice Thomas identified *Southeastern Promotions* as supporting the contention that "[o]ur public forum cases have 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." 518 U.S. at 828.

Although state law obligated the City to create the public access channels, it afforded the City discretion as to how to administer them. In particular, the City could choose between running the channels itself—or assigning that administrative function to a third party. See 16 N.Y.C.C.R.R. § 895.4(c)(1).[14]

In accord with this framework, several municipalities in New York have chosen to administer the public access channels themselves. Buffalo Public Access, for example, is "a division of the City of Buffalo Office of Telecommunications"; "[t]he Office is responsible for programming on Channel 20," Buffalo's public access station. See perma.cc/3ZN7-V8LB. Municipalities in Brighton (perma.cc/P4EV-YDR5), Irondequoit (perma.cc/USM7-C7DW), Rye (perma.cc/33H6-6227), Scarsdale (perma.cc/9LU3-W8V7), and White Plains (perma.cc/4WKL-38UU) have likewise decided to run their public access channels themselves.

As we have said, per state law, New York's public access channels must operate on a first-come, first-served basis. See pages 26-29, *supra*. Had New York City chosen to run its public access channels itself—

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[14] To resist the conclusion that the City owns the relevant right, petitioners cite 16 N.Y.C.C.R.R. § 895.4(c)(1) and argue that, "under the applicable regulations, control of the public access channels in Manhattan has never resided with the City." Pet'rs Br. 44-45. Not so. Section 895.4(c)(1) establishes that the cable operator is the default administrator of public access if the municipality fails to designate another "entity." This imposes an obligation on the cable operator, not a limitation on the municipality. The municipality retains complete control—it can designate *any* entity, including *itself*, to operate the public access channels. The several municipalities in New York that *do* administer their public access channels directly prove the point.

like several other municipalities in New York do—they would plainly qualify as public forums.

New York instead chose to delegate the administrative function to MNN. That delegation does not affect the public forum analysis because there was no transfer of ownership to MNN. The City—*not MNN*—continues to own the essential rights to the channels. This is proven by the fact that the City retains discretion to remove MNN as administrator and substitute a new entity to run the public access channels. In total, MNN is administering a publicly-owned right to public access channels.

In the City's Franchise Agreement with Time Warner, the City determined that it would choose a "Community Access Organization" to administer the public access channels. Franchise Agreement §§ 1.18, 8.1.8. The CAO is expressly defined as "the nonprofit corporation that has been designated by the Borough President." *Id.* § 1.18. The City—and the City alone—selects the administrator for the public access channels.

The first clause in the CAO Agreement between MNN and Time Warner recognizes that their relationship exists solely because MNN was "designated by the Borough President of Manhattan" as the CAO. CAO Agreement, at 2. Per the CAO Agreement, MNN's function is to "administer and manage" the placement of content on the public access channels. *Id.* § 3.1. Nothing suggests that MNN owns the right to place content on the channels; it has been assigned administration and management only.

Critically, in identifying the length of their agreement, MNN and Time Warner agreed that their relationship is contingent on "the designation of the

CAO by the Borough President remain[ing] in effect." CAO Agreement § 5.1.02. If that designation does not "remain in effect," then MNN's ability to deliver content via Time Warner's cable system ceases. *Ibid.* This agreement—which was created via negotiations between the City and Time Warner, and which was attached to the Franchise Agreement (see Franchise Agreement § 8.3)—confirms that the City has authority to remove MNN as the CAO. MNN is itself party to this agreement. The City is under no obligation whatever to maintain MNN as the CAO for Manhattan.

History illustrates the Manhattan Borough President's authority. According to MNN's own account, MNN "assumed administrative responsibility for the public access channels in September 1992 after twenty years of administration by the local cable operators." *Denver Area* JA235. See also Pet'rs Br. 3 ("[T]he Manhattan Bureau President chose MNN to replace Time Warner."). That is, the City changed administrators to MNN. MNN currently has what it identifies as "administrative responsibility" (not ownership) because of the City's decision. The City has the authority to make a similar change in the future.

In sum, the City controls Manhattan's public access channels. It created those channels through its agreements with the cable operators. And it selects who administers those channels. While it has chosen MNN for now, the City may change administrators, a power it has previously exercised. This all reflects

that the City—*not MNN*—owns and controls the rights essential to the public access channels.[15]

b. This conclusion is independent of the issue that engaged the Court in *Denver Area*—the extent and nature of the cable operators' property and First Amendment interests in their cable distribution networks.

Those issues were present in *Denver Area* because there was a *conflict* between the cable operators' rights to control their distribution network and the programmers' content placement rights. Justice Thomas, in his partial dissent, was of the view that, "*when there is a conflict*, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion." 518 U.S. at 816 (emphasis added).

Here, there is no such conflict. There is no claim by or against a cable operator. This case does not therefore pit the cable programmer's rights against the cable distributor's rights.

Put differently, the issue in this case is whether a New York public access channel can censor content that producers seek to air. The issue in *Denver Area*, by contrast, was whether the *cable operator* could censor content. These are materially distinct inquiries because they involve different underlying rights.

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[15] If the City transferred the public access channels to another entity, the new administrator may not be able to use the name "Manhattan Neighborhood Network" or other intellectual property that MNN might claim to own. But the public forum is not the channels' name. It is the public access channels themselves—which the City controls.

The *amicus* briefs confirm this point. NCTA, which was a party in *Denver Area*, represents members who own and operate "cable television systems serving nearly 80 percent of the nation's cable television customers." NCTA Br. 1. NCTA advances Justice Thomas' position from *Denver Area*. *Id.* at 4-17. But NCTA expressly recognizes that "whether the PEG-channel requirement is itself constitutional is not directly before this Court." *Id.* at 3. For that reason, NCTA—the voice of the cable industry—does not oppose a ruling in respondents' favor. *Id.* at 2.

In fact, our position is consistent with the views expressed by both Justice Kennedy and Justice Thomas in *Denver Area*. Justice Kennedy (joined by Justice Ginsburg) recognized that when a public access channel is "open to all comers"—as New York's are—then the "[p]ublic access channels" are "a designated public forum." 518 U.S. at 791.

Justice Thomas' views in *Denver Area* also support our position. Justice Thomas noted that "[i]t is no doubt true that once programmers have been given, rightly or wrongly, the ability to speak on access channels, the First Amendment continues to protect programmers from certain Government intrusions." 518 U.S. at 820. In view of the franchise agreements, the public access channels certainly exist. If New York has structured these channels as a public forum, the First Amendment applies.

The *Denver Area* dissent's discussion of the public forum doctrine (518 U.S. at 826-831) is also consistent with our argument. Because *Denver Area* addressed a conflict between the cable network distribution right and the programmers' content placement right, Justice Thomas focused on whether the

cable network itself is a public forum. The dissent began with the premise that "[c]able systems are not public property," and it continued to reason that governments generally may not designate public forums on private property. *Id.* at 827-829.

But this case does not require the Court to decide whether the *cable distribution network* is itself a public forum. That is not our argument. The only issue is whether local governments can configure the *public access channel* as a public forum. Because that right is publicly held, the private property analysis of the *Denver Area* dissent is inapplicable.

Local governments have the autonomy to create a public access station that is a designated public forum—the television equivalent of a public park or sidewalk. It would be a surprising affront to localism if state and municipal governments *lacked* this power. Recognizing that this authority exists—and that New York has exercised that power here—is all that our argument requires.

2. Alternatively, there is a public easement.

If, contrary to our principal position, MNN owns some relevant right, that right is subject to an easement in favor of the public (on the first-come, first-served basis defined by state law). Likewise, if the cable operators' interests were at issue here, they would also be subject to easements.[16]

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[16] MNN—one of the Nation's largest administrators of public access television—cannot seriously dispute that there is, at the very least, a public easement that authorizes public access television. Otherwise, public access television itself would lack legal foundation.

a. In *Denver Area*, at least five Justices agreed that the legal requirements that give rise to public access channels create a form of a public easement. The three-Justice plurality explained that "the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land." 518 U.S. at 760-761. And Justice Kennedy (joined by Justice Ginsburg) explained that a cable franchise agreement "create[s] a right of access equivalent to an easement in land." *Id*. at 794.

Justice Thomas' dissent also recognized that a public forum can exist on property in which a government has a legally-protected interest, such as an easement. The dissent noted "the common practice of formally dedicating land for streets and parks when subdividing real estate for developments." 518 U.S. at 827. "Such dedications may or may not transfer title, but they at least create enforceable public easements in the dedicated land." *Ibid*. As Justice Thomas concluded, "[t]o the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum." *Id*. at 828.[17]

There was thus common ground in *Denver Area* that, in appropriate circumstances, the government's

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[17] Lower courts have properly applied public forum analysis to sidewalks that are privately-owned but subject to a public easement. See *First Unitarian Church* v. *Salt Lake City Corp.*, 308 F.3d 1114, 1123 (10th Cir. 2002); *Venetian Casino Resort, L.L.C.* v. *Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 943 (9th Cir. 2001).

control over an easement can be a basis for a public forum.

b. If (contrary to fact) MNN owns the relevant rights relating to Manhattan's public access channels, MNN's ownership is subject to an easement for public access.

As we have said, whatever interest MNN holds flows from the City. The City designated MNN as the administrator of Manhattan's public access channels, and MNN is legally obligated to air content on a free, first-come, first-served basis. See pages 5-6, 9, 26, *supra*. MNN recognized as much below. See JA59-60. Any private right MNN arguably holds is therefore subject to a public easement. And the City may designate that easement as a public forum. See Restatement (Third) of Property § 2.1 (2000) (describing ability of a contract to impose a servitude).

c. If (contrary to fact) the rights of cable operators are at issue here, they are similarly subject to an easement.

In a franchise agreement, a cable operator receives a critical benefit not available to the public at large—permission to use public rights-of-way to erect a cable system. See 47 U.S.C. § 541(a). The government owns and manages these rights for the public welfare. Here, Time Warner expressly bargained for access to these rights. See, *e.g.*, Franchise Agreement §§ 1.47, 4.1.

In exchange for conferring this benefit on Time Warner, the City received a reciprocal easement—the right to place content over certain channels on the cable system. As we have described, the Franchise Agreement requires a minimum of six public

access channels (Franchise Agreement § 8.1), and it obligates Time Warner to transmit public access channels to all subscribers (*id.* § 8.1.6). The Franchise Agreement contains detailed provisions about various enforcement mechanisms, including an "injunction," if necessary. See, *e.g.*, *id.* § 15.1.6. The cable operator cannot transfer the cable franchise without the City's permission (*id.* § 13.1), and the CAO Agreement obligations expressly bind any successor (CAO Agreement § 5.2).

In sum, the Franchise Agreement conferred on the City a legally-enforceable right to place content on Time Warner's cable system in exchange for Time Warner's right to run cable through public rights-of-way. That obligation follows the cable system itself, continuing to apply even if Time Warner sells its cable system. The content placement right—and the public forum it represents—has existed since the creation of the cable company's property right in the cable system. These express contractual provisions thus create a servitude on the underlying property rights. See Restatement (Third) of Property § 2.1.

D. Congress vested local governments with discretion to experiment—and the wisdom of establishing public forums is properly a local decision.

Congress has conferred discretion on state and local governments to create public access television and, if they choose to exercise that discretion, how to structure it. See, *e.g.*, 47 U.S.C. § 531 ("A franchising authority *may* establish requirements" regarding PEG channels.) (emphasis added). The courts should respect New York's policy choices.

"This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). The Court affords "[d]eference to state lawmaking," which "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Ibid*. Indeed, local governments are "in a better position than the Judiciary to gather and evaluate data on local problems." *City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 440 (2002).

Often, as reflected here, "[f]ederalism secures the freedom of the individual." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). New York has chosen to designate for its residents a public forum in public access television. That freedom-enhancing decision is properly the right of a state or local government.

For these reasons, petitioners' concern regarding the policy consequences of New York's action are misplaced. See Pet'rs Br. 58-59. See also CAC Br. 22-28.[18] Petitioners should direct these views to New York government—not this Court. If, as petitioners maintain, existing state law is bad policy, New York can change it. The wisdom of New York's decision as a policy matter is not a question for this Court. The Court should not "disable local governments from

[18] Chicago Access Corporation's concerns are additionally unfounded because there is no evidence that Illinois or Chicago has adopted a first-come, first-served policy.

making" "choice[s]" regarding how to structure public access. *Denver Area*, 518 U.S. at 773 (Stevens, J.).

In all events, petitioners' concerns regarding the practicalities of our position lack merit. To begin with, for decades, the First Amendment has governed the scores of public access channels across the nation that are run *directly* by municipalities. See, *e.g.*, page 35, *supra*. Several courts, moreover, have entertained First Amendment claims against public access stations. See Pet. App. 49a-50a & n.7. See also Pet'rs Br. 27-30. Yet petitioners muster no real-world examples of judicial overreach. Pet'rs Br. 58-59.

That is for good reason: Regardless whether New York's public access channels are limited or unlimited public forums, MNN may impose neutral time, place, and manner restrictions. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech."). While this requires "narrow tailoring," the administrator of a forum need not choose "the least restrictive or least intrusive means" of regulating it. *Id*. at 798-799. MNN certainly can schedule its programs—just as school districts can schedule outside groups' meetings in classrooms, even when those classrooms have been opened as a public forum. And, if MNN is a limited public forum, it may reasonably restrict the range of speakers and the permissible subjects of speech. See *Good News Club*, 533 U.S. at 106-107.

Subjecting MNN to the First Amendment precludes viewpoint discrimination in its administration of the public access channel. According to its own policies, MNN *already* disclaims viewpoint discrimina-

tion. Pet. App. 37a. And, in the district court, petitioners conceded that, pursuant to state law, MNN cannot "exercise viewpoint-based discrimination." JA60. Applying the First Amendment cannot pose any practical burden because, as MNN concedes, it is already subject to state law requiring viewpoint neutrality.

What is more, MNN is a state actor solely to the extent it performs a public function—here, administering a public forum. See pages 51-59, *infra*. We do not contend that any of MNN's *other* conduct is subject to constitutional standards.[19]

MNN's preference to avoid litigation—a preference no doubt shared by the school in *Good News Club* and the university in *Rosenberger*—is no reason to cast off constitutional obligations. The Court does not allow schools to discriminate against religious organizations merely because litigation itself can be an "expense" or "distraction" in the face of "scarce resources." Pet'rs Br. 59. The result should be no different here.

Finally, lower courts are well-equipped to weed out meritless claims. The claim in this case, however, does have merit. Respondents criticized MNN for terminating a grant program while simultaneously increasing executive compensation. MNN subsequently retaliated by banning respondents—and their speech—from the public access channels.

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[19] We do not contend that MNN is subject to "state sunshine" laws. Pet'rs Br. 59 n.14. That said, MNN is subject, expressly, to a public disclosure law. See page 6, *supra*.

E. This case does not address other public access structures, cable operators, the Internet, or private property.

The Court should decide this case on its narrow terms.

1. Petitioners are wrong to assert that the rule implicated here has any bearing on "Time Warner, Facebook, Twitter, and National Public Radio." Pet'rs Br. 57.

To begin with, this case involves public access in only the few states with a free, first-come, first-served rule. See pages 30-31, *supra*. We do not urge—and the Court should not adopt—a one-size-fits-all approach.[20]

Moreover, as *amicus* NCTA underscores, this case does not implicate rights relating to a cable distributor. See page 39, *supra*. The issue that divided the Court in *Denver Area* is not presented here.

Nor does this case involve privately-owned Internet sites. The Internet Association (at 23) confirms the "highly specific facts" present in this case—and the "correspondingly limited holding" that is warranted. While the Internet Association opposes imposing the First Amendment on private Internet sites, it is neutral as to this case. *Id*. at 24. This fatally undermines the speculative fears raised by peti-

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[20] Nor does this case address leased access television, where no government has designated the channel as a forum open to the public. Cf. Pet'rs Br. 26 n.4. *Loce* v. *Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), is therefore consistent with our argument; there was no state-imposed free, first-come, first-served rule there. Pet. App. 15.

tioners (at 56-57) that a holding for respondents would render Internet sites public forums.

Indeed, only a *government* may designate a public forum; a public forum cannot be created by a private party or via government inaction. See pages 22-24, *supra*. See also EFF Br. 19. The First Amendment does not govern spaces created by private parties—even if those privately-owned spaces have facial similarities to public forums. See Cato Br. 11-14; Chamber Br. 7-9. Facebook and YouTube, for example, are not "public forums" in the First Amendment sense.[21] This also explains why our rule has no bearing on National Public Radio or any other forum that has not been designated by the government as generally open to the public.

2. Petitioners and some *amici* focus on the extent to which a government may designate a public forum on private property. See Pet'rs Br. 30-34, 56-58. But that is not this case: As we have explained, New York City, not MNN, owns and controls the public access channels. See pages 32-43, *supra*. If a government did seek to designate a public forum on private property, two complex questions would emerge. Petitioners have not raised—because they cannot raise—either contention.

The first is the extent to which the government's action is consistent with the Takings Clause. In *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980), then-Justice Rehnquist's majority opinion held that the state's requirement allowing individu-

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[21] Additionally, the Dormant Commerce Clause precludes state and local governments from regulating Internet websites. See *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986).

als "rights of free expression and petition on shopping center property clearly" was not an "unconstitutional infringement of * * * property rights under the Taking Clause." In *Dolan* v. *City of Tigard*, 512 U.S. 374, 394 (1994), Chief Justice Rehnquist's majority opinion held that a taking "different in character" from that in *PruneYard* could state a constitutional claim.

Because this case does not involve the designation of private property as a public forum, this case is outside the takings analysis entirely. That is likely why MNN has never made a takings argument. MNN had no private property rights in the public access channels. Moreover, there was no use of "the government's power to *redefine* the range of interests included in the ownership of property." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (emphasis added). Even if MNN has a property interest in the public access channels, nothing has ever been taken from it; the administrative authority over the channel that the City gave MNN has always been subject to the first-come, first-served requirement.

Second, the First Amendment generally precludes the government from obligating individuals or companies to speak, or to host others' speech. See, *e.g.*, *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of Cal.*, 475 U.S. 1 (1986); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974).

But petitioners have not advanced any such argument. Nor could they. MNN entered into the CAO Agreement that provides MNN, among other things, substantial funding. As petitioners recognize (JA59-60), MNN agreed, as a condition of receiving funding,

that it may not engage in editorial curation or viewpoint discrimination on the government-provided channels. See pages 8-9, 26-28, *supra*.

MNN has continued to voluntarily accept this requirement. As MNN says in response to the frequently asked question "[w]hat can I put in my show," "MNN champions freedom of speech. You can take any political stance or preach any religious idea. You can also even record a flower for 28 minutes or play a uk[u]lele and sing expletives! We encourage you to use MNN as a platform to broadcast your voice to the world." *FAQs*, MNN, perma.cc/JL3B-HF7H. Far from objecting to being a first-come, first-served forum for speech, MNN has embraced that as its mission. Pet. App. 37a.

Even if MNN had objected, there is not "a plausible fear" here that viewers would attribute respondents' speech to MNN. *Rosenberger*, 515 U.S. at 841. Absent such a fear, requiring MNN to merely provide space for the speech does not unconstitutionally compel MNN to speak. See, *e.g.*, *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006); *PruneYard*, 447 U.S. at 87-88.[22]

Petitioners have never—here or below—raised either a takings or a compelled speech claim. That is for good reason, as neither doctrine provides petitioners any support in the context of this case. In different circumstances, however, these constitutional protections may limit state authority.

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[22] Because there is no claim by or against a cable operator, the First Amendment rights of cable operators are not implicated, either. See NCTA Br. 3. In particular, the viability of *Turner I* is not at issue.

II. Administering a public forum is a public function.

When a government assigns a public function to a nominally private actor, constitutional safeguards continue to apply. As this Court has long held, "[t]he State cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia* v. *McCollum*, 505 U.S. 42, 53 (1992).

Administering a public forum qualifies as such a public function. Were it otherwise, a municipality could bypass the First Amendment wholesale by interposing a nonprofit as the entity that approves demonstration permits for a public park or decides who may use school classrooms.

A. The Constitution governs the performance of public functions.

The Court has, "of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). A public function is that "which is traditionally associated with sovereignty." *Id.* at 353.

The Court was unanimous on this point in *Brentwood*. As the majority explained, "a nominally private entity" is treated "as a state actor" "when it has been delegated a public function by the State." *Brentwood*, 531 U.S. at 296. The dissent agreed that the Constitution applies when the entity is performing "a function that has been traditionally exclusively reserved to the State." *Id.* at 309 (Thomas, J.) (quotation omitted).

For their part, petitioners do not dispute that a government's delegation of a public function to a pri-

vate entity is a sufficient basis to find state action. See Pet'rs Br. 41. Chicago Access Corporation (CAC), however, asserts that there is some overlooked rule by which a private entity performing a public function does not qualify as a state actor to the extent that it allegedly "*violated* state law." CAC Br. 9.

Not only is that argument contrary to the unanimous views of the Court in *Brentwood*, but it is foreclosed by *West* v. *Atkins*, 487 U.S. 42 (1988), a case that CAC does not cite, much less discuss. *West* involves the state's sovereign authority to incarcerate convicted criminals and the Eighth Amendment's corresponding obligation "to provide adequate medical care to those whom it has incarcerated." *Id*. at 54. When "the State delegate[s] that function" to a private doctor, the doctor takes on a public function, subject to constitutional limits. *Id*. at 55-56. Private action alone cannot create this designation, because "[i]t is only those physicians authorized by the State to whom the inmate may turn." *Id*. at 55. In *West*, the doctor was alleged to have violated state negligence law, but he was subject to the Constitution all the same. *Id*. at 48 n.8.

West ultimately establishes that the state has a constitutional obligation "to provide medical treatment to injured inmates," and "the delegation of that traditionally exclusive public function to a private physician [gives] rise to a finding of state action." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 55 (1999). That is a sufficient basis for a Section 1983 claim. See *West*, 487 U.S. at 49 ("[I]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, that conduct is also action under color of state law and will support a suit

under [Section] 1983.") (quotation and alteration omitted).

West is consistent with the Court's longstanding law that delegation of a traditional, exclusive public function is a sufficient basis to conclude that a nominally private entity "may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). *Lugar* itself identifies and endorses the propriety of "the 'public function' test." *Id.* at 939. *Lugar* denied state action in circumstances where there was *not* a delegated public function *and* the defendant acted in derogation of state law. See *ibid.* *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), are likewise inapposite, because neither involved delegation of an actual "public function."

A contrary result would leave a broad gap in the Constitution's protection of individual rights. If "[c]ontracting out" public functions to a private party "were the basis for delimiting [Section] 1983 liability, 'the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to "private" actors, when they have been denied.'" *West*, 487 U.S. at 56 & n.14. While states have flexibility in how they wish to perform public functions, they have no flexibility to avoid the Constitution.

B. Administering a public forum is a public function.

Administration of a public forum is a traditional and exclusive state function. A state may not avoid the First Amendment by contracting the function out to a private entity.

1. This is not an open question; the Court resolved it in *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

Relying upon its early public forum cases, including *Hague*,[23] the Court identified the restrictions the First Amendment imposes on the ability of state actors to restrict speech rights in "streets" and "sidewalks." *Marsh*, 326 U.S. at 504 & n.1. The Court concluded that regardless of whether a corporation or municipality administers those forums, "the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id*. at 506-507.

Marsh thus establishes that "the exercise of constitutionally protected rights on the public streets"—which are a quintessential public forum—"could not be denied by the owner," even where that entity is nominally private. *Evans*, 382 U.S. at 299. See also *Brentwood*, 531 U.S. at 313 (Thomas, J., dissenting) (*Marsh* recognized that administering "the streets of a company town" is state action); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 639 (1991) (O'Connor, J., dissenting) (*Marsh* held that a company town's "attempt[ing] to prohibit on its sidewalks certain protected speech" was a "traditional government function").

2. Even if the question were open, the answer remains. The function of administering a designated public forum exclusively and traditionally rests with the state.

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[23] *Perry* identifies Justice Roberts' opinion in *Hague* as a foundational authority regarding public forums. See 460 U.S. at 45.

To begin with, the power to designate a public forum is an exclusive state function. A public forum is that which the "government" has "lawfully dedicated" as a place where the "principal purpose [is] the free exchange of ideas." *Krishna Consciousness*, 505 U.S. at 678-680. Government "inaction" cannot "create a public forum." *Id.* at 680. Nor can a private party create a public forum; even if a private entity opens a place for the public to speak, that is not a "public forum" within the meaning of the First Amendment. *Ibid.*

What is more, the power to administer a "public forum" lies exclusively with the state or its delegee. Absent a delegation from the state, private parties categorically cannot determine who has access to public parks or public classrooms. This is thus an exclusive function of the state, inherently tied to sovereign authority.

This is also the sort of function to which the Constitution directly speaks. As this Court has long identified, the First Amendment strongly protects speech in a public forum. See *Rosenberger*, 515 U.S. at 829; *Police Dep't of City of Chi.* v. *Mosley*, 408 U.S. 92, 96 (1972). That the Constitution bears specifically on this particular sovereign function helps confirm that it is among the narrow range of "public functions."

Administration of a public forum is also traditionally a state function. As Justice Roberts said long ago, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

questions." *Hague*, 307 U.S. at 515. Such forums—and their regulation—have existed since "ancient times." *Id*. at 515-516.

These points are all parallel to the holding in *West*. Only a government, exercising sovereign authority, can hold individuals prisoner; thus, providing services to those individuals requires sovereignty. See *West*, 487 U.S. at 55-56. And the Eighth Amendment protects prison inmates against cruel and unusual punishment (*id.* at 56), just as the First Amendment protects speakers in public forums.

Meanwhile, administering a public forum is distinct from non-sovereign functions that are not the exclusive prerogative of the state. Running a public utility, for example, does not qualify as a public function because it does not depend on "sovereign[]" authority; non-sovereigns can and do run utilities. *Jackson*, 419 U.S. at 353. Likewise, the education of special-needs students is not the "exclusive province of the State." *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982).

The lower courts agree that administering a public forum is a public function. See Pet. App. 19a (Lohier, J., concurring) ("A private entity's regulation of speech in a public forum is a public function when the State has expressly delegated the regulatory function to that entity."); *Watchtower Bible & Tract Soc'y* v. *Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011); *United Church of Christ* v. *Gateway Econ. Dev. Corp.*, 383 F.3d 449, 454-455 (6th Cir. 2004); *Lee* v. *Katz*, 276 F.3d 550, 555 (9th Cir. 2002).

3. Petitioners, trying to make this case about *all* public access channels, characterize the relevant function as "[t]he provision of cable television gener-

ally" or "public access channels in particular." Pet'rs Br. 43. These, petitioners contend, are not functions "*traditionally* provided by government." *Ibid.*

That is not our argument. As a section heading in our brief opposing certiorari made clear, our contention is that "[a]dministering *public forums* is a public function." Opp. 21 (emphasis added).

The closest petitioners come to engaging this point is their recognition of Judge Lohier's concurrence, explaining that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Pet. App. 21a. Petitioners respond that this "improperly assumes the antecedent." Pet'rs Br. 44. A finding of a public forum is of course the first step to this analysis. If, however, we are right about the antecedent, petitioners have no substantive argument. And we have explained why petitioners are flatly wrong to assert that the City lacks control as to the public access channels. See pages 33-38, *supra*.

By contrast, administering a gathering place that is *not* a "public forum" within the meaning of the First Amendment is not a public function. For example, because they do not qualify as traditional or designated public forums, the First Amendment does not govern privately-owned shopping malls. See, *e.g.*, *Hudgens* v. *NLRB*, 424 U.S. 507, 508, 522 (1976).

4. While our argument focuses on the public function analysis, "the direct and indispensable participation" of what is "beyond all question * * * a state actor" helps confirm the presence of state action. *Edmonson*, 500 U.S. at 624.

MNN's existence derives from sovereign acts. New York City incorporated MNN and appointed its initial board. See page 7 n.1, *supra*. MNN administers the public access channels solely because the City created them and designated MNN as the administrator. See pages 7-9, 33-38, *supra*. Meanwhile, the City retains discretion to replace MNN. See pages 36-37, *supra*. And MNN depends upon the City's coercive funding; the City obligates cable operators to fund MNN. See pages 8-9, *supra*.

To be clear, we do not maintain that the sovereign's creation and maintenance of a nominally private entity alone compels the finding of state action. But these unique circumstances further militate in favor of the result reached below.[24]

5. There is an additional basis to conclude that MNN's conduct with respect to its content decisions qualifies as state action. State law wholly dictates the terms on which MNN airs content. The first-come, first-served mandate imposed by law and contract displaces any independent decision-making and strips MNN of editorial discretion. State law also compels MNN to provide free access to users. And

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[24] Petitioners suggest that respondents could seek relief from the New York Public Service Commission. See Pet'rs Br. 59-60. They do not, however, assert that this has any bearing on respondents' claims here. A state cannot avoid constitutional claims by creating an administrative agency; "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under [Section] 1983." *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990). Nor is there any basis to conclude that the state agency actually adjudicates *First Amendment* claims or provides remedies commensurate with a constitutional claim. Indeed, respondents *tried* to bring such a claim, but they secured no remedy. See Dist. Ct. Dkt. No. 49.

MNN's authority rests on a delegation of power from New York City. The City, meanwhile, maintains control over the public access channels. As *amicus* ACLU argues, in the entirety of these unique circumstances, MNN engages in state action when making content decisions. See *National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).

C. The public function doctrine precludes circumvention of the First Amendment.

As *Rosenberger*, *Good News Club*, *Marsh*, and others hold, the public forum doctrine precludes discrimination against disfavored speakers. Yet if the First Amendment did not apply when the government appointed a nonprofit to administer the forum, such discrimination would become commonplace.

Take *Lamb's Chapel*. Once the school board opened school facilities for "social, civic and recreational meetings," it could not deny access to an evangelical church on the basis of its views. 508 U.S. at 397. But under petitioners' theory, if the school interposed a nonprofit to serve as facility gatekeeper, such denials would be constitutional. That is not, and should not become, the law. Holding otherwise would destabilize fundamental First Amendment protections, with the predictable result of harming politically disfavored groups.

* * *

This case illustrates that, in our federal system, state and local governments are free to make different policy decisions. Some of those choices have constitutional ramifications. New York has made a unique, freedom-enhancing decision to open a partic-

ular kind of public forum to its citizens. Its ability to make this choice deserves respect.

CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted.

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