No. 17-1702

IN THE

Supreme Court of the United States

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

Petitioners,

vs.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

MNN and its employees are not state actors under any of this Court's state action tests. Respondents and their *amici* now ask the Court to apply a new test (different even from the Second Circuit's analysis)—one that would expand the state action doctrine and have far-reaching consequences on the distinction between the private and public spheres. The Court should reject this invitation.

Respondents inundate the Court with new allegations that appear nowhere in their Amended Complaint[1] and with arguments never made below. But Respondents cannot divorce themselves from their pleading on an appeal from a motion to dismiss. And their Amended Complaint failed to allege plausibly that the challenged conduct was fairly attributable to the state. Indeed, other than designating MNN (28 years ago) to operate channels that would otherwise have been operated by Time Warner Cable and having the ability to nominate two members (out of thirteen) of MNN's board, the City is not alleged to have any connection with MNN. Respondents did not allege that the City was involved in MNN's policies, programming, or practices—and they certainly did not allege that the City was involved in the conduct they challenged.

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[1] These improper new allegations—many of which cite to an anonymous blog for support—concern MNN's prior community grant program and *ad hominem* attacks against MNN's Executive Director. Brief for Respondents 10-12 & n.3 ("Resp. Br.").

Respondents urge this Court to determine (as the Second Circuit did)—*on the pleadings*—that public access channels are, as a matter of law, *constitutional* public fora. Neither the Amended Complaint, the law, nor the facts support their argument. If producers, like Respondents, want to challenge MNN's decisions, they have a perfectly good venue for doing so at the New York State Public Services Commission. But this case has never belonged in federal court.

ARGUMENT

I. MNN IS NOT A STATE ACTOR

Respondents abandon the Second Circuit's reasoning and now argue that MNN is a state actor under an expanded version of the public function test or under a new theory of delegation. Neither argument works.

A. *The City Did Not Delegate a Public Function to MNN*

Respondents suggest that the Manhattan Borough President's 1991 designation of MNN to run Manhattan's public access channels is somehow akin to the state prison outsourcing its medical care of prisoners to a private doctor in *West v. Atkins*, 487 U.S. 42 (1988). Resp. Br. at 52-53. But the situations are completely different: North Carolina prisons have a *constitutional* (and statutory) obligation to provide medical care to inmates. 487 U.S. at 54-55 & n.13. The prison in *West* satisfied these obligations by contracting with a private physician to provide medical services. *Id.*

Here, by contrast, New York City has no constitutional duty to operate public access channels. Nor does the City have a statutory or regulatory obligation to operate public access channels. Instead, the relevant New York State regulation requires franchisees, i.e., *cable operators*—not municipalities—to set aside PEG channels. 16 NYCRR § 895.4(b). Those same regulations require that *cable operators*—not municipalities—operate those channels unless and until the municipality designates a third party to operate them. *Id.* at § 895.4(c)(1). The state regulation never contemplates—much less requires—that a municipality itself would ever operate a public access channel. The Borough President's designation was therefore not the outsourcing of any constitutional, statutory, or regulatory obligation of the City to a private entity.[2] Rather, it was simply a decision about who should run the public access channels: the cable operator or a third party.

This Court has made clear that where, as here, a regulatory scheme imposes an affirmative obligation not on the municipality but *on a private entity*, the state is not delegating a public function in any way that would render the private entity a state actor. Indeed, in this same scenario, Justice Rehnquist explained in *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974):

> If we were dealing with the exercise by [a private entity] of some power delegated to it by the State which is traditionally asso-

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[2] Before state regulations allowed the City to designate an entity to run the public access channels, they were operated by the cable companies. *See* Brief of New York County Lawyers Association as *Amicus Curiae* in Support of Respondents at 15-25.

> ciated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated entities, *it imposes no such obligation on the State*.

Id. at 352-53 (emphasis added). The Court reaffirmed this principle in *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), finding no delegation of a public function where "nothing in Pennsylvania's Constitution or statutory scheme obligates *the State* to provide either medical treatment or workers' compensation benefits to injured workers. … Instead, the State's workers' compensation law imposes that obligation on *employers*." *Id.* at 55-56 (emphasis added). That is exactly the situation here. The PSC regulations demand nothing of the City but require the cable operator to set aside channels for public access.

B. *Respondents' Proposed Public Function Analysis is Flawed*

Respondents also argue that the operation of a "public forum" satisfies the public function test. Resp. Br. at 53-59. But this argument fails for multiple reasons.

Recognizing that the public function test has "carefully confined bound[aries]," *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 163 (1978), this Court has always made a careful determination of whether the specific "function" at issue is a "traditional" and "exclusive" function of government. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 309 (2001) (Thomas, J., dissenting) (apply-

ing public function test by examining statutory schemes and historical data to determine whether governing interscholastic sports is a traditional and exclusive role of government); *Sullivan*, 526 U.S. at 55-57 (considering historical data and statutory scheme in applying the public function test); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (analyzing Massachusetts statutes and history to determine whether provision of education for maladjusted high school students was traditionally done by the government alone); *Flagg Bros.*, 436 U.S. at 159-63 (considering historical and statutory context to determine whether government had monopoly over settlement of disputes between debtors and creditors).

Clearly the operation of a public access television station is neither a traditional nor exclusive government function. The *Denver Area* plurality acknowledged that public access channels have been run by a variety of entities: nonprofits, cable operators, and municipalities. *Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 761 (1996). And in New York, the state regulations only contemplate the cable operator or a third party operating these channels. Indeed, in Manhattan, this function has *never* been governmental: either the cable operator or MNN has run the public access channels. Resp. Br. at 37. As a result, empirically, operating public access channels does not satisfy the public function test.

Recognizing this infirmity, Respondents propose a new and much broader formulation of the public function test. They argue that the Court should consider the function: <operation-of-a-public-forum-*in-general*>, rather than <operation-of-a-public-access-channel>, when applying the public function test.

But how can MNN be engaging in a function that is traditionally and exclusively a function of government if, *empirically*, what MNN is *actually* doing (<operation-of-a-public-access-channel>) is ***not*** a traditional and exclusive government function?

The Court has always focused on the *specific* function at issue, and for good reason. Depending on how broadly one defines the "public function," many private activities would, for example, fall under "promot[ing] the general Welfare" or "secur[ing] the Blessings of Liberty." U.S. Const. pmbl. And the broader the function considered, the more likely ostensibly private conduct would be drawn in as state action. If, for example, in *Rendell-Baker*, the inquiry had been broadened to consider whether the provision of *public education* was a traditional and exclusive role of government, the Court may well have reached a different result than it did. *Contra Rendell-Baker*, 457 U.S. at 842. As it has for the last 50 years, the Court chose to engage in the narrower inquiry with "carefully confined bound[aries]." *Flagg Bros.*, 436 U.S. at 163.

Respondents also seek to draw an analogy to government administration of quintessential public fora: streets, parks, and sidewalks. But these spaces are *sui generis*—they "occup[y] a special position in terms of First Amendment protection." *U.S. v. Grace*, 461 U.S. 171, 180 (1983). Public access channels are not historically operated by the government and are simply not the same as streets, parks, and sidewalks. And MNN's operation of the public access channels is not analogous to providing parade permits or operating a public park. If a city delegated the parade permit process to a private entity, it might well be deemed a state actor under the public

function test for carrying out a traditionally exclusive government function.

In addition, Respondents' argument still puts the cart before the horse. It requires a *predicate* finding that Manhattan's public access channels are, in fact, *constitutional* designated public fora—without first determining the nature of the entity operating (and, more importantly, controlling) the forum. Just as in *Lebron*, where it was necessary for the Court to determine *first* that Amtrak was a state actor (or part of the government), rather than whether Amtrak's bulletin board in Penn Station was a constitutional public forum, it is necessary here to determine first whether MNN is a state actor. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383-400 (1995).

Moreover, determining whether something is a designated public forum is no walk in the park (as it were), *particularly on the pleadings*. It requires a showing that the government not only opened a space for speech but maintains control of that space. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). It is no surprise that over the past 50 years, this Court has found less than a handful of instances where the facts sufficiently demonstrated the creation of a *constitutional* designated public forum.

Respondents argue that this Court previously adopted their argument in *Marsh v. Alabama*, 326 U.S. 501 (1946). But they fail to acknowledge that *Marsh* was strictly limited to its facts, *i.e.*, a private company's operation of a company town, an "economic anomaly of the past." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561 (1968); *see also Flagg Bros.*, 436 U.S. at 159 (recognizing "limited reach" of *Marsh* to its

facts); *Hudgens v. N.L.R.B.*, 424 U.S. 507, 516-20 (1976) (abrogating *Food Emps. v. Logan Valley Plaza*, 391 U.S. 308 (1968), which sought to expand *Marsh's* holding to a private shopping mall). Respondents do not allege that MNN is operating anything remotely like a company town. *Marsh* is therefore inapplicable.

Respondents point to no case where this Court has applied the public function state action test to a vague and amorphous function such as <operation-of-a-public-forum-*in-general*>. *Cf.* Pet. Br. 45. They ask the Court to break new ground and radically expand the public function test, thereby eviscerating the test's "carefully confined bound[aries]." *Flagg Bros.*, 436 U.S. at 163. The Court has no reason to do so here.[3]

II. MANHATTAN'S PUBLIC ACCESS CHANNELS ARE NOT CONSTITUTIONAL PUBLIC FORA

Respondents argue that the "structure" and "nature" of New York's public access channels warrant a finding that they are designated public fora, without any reference to state action whatsoever. Resp. Br. at 24-26. But Respondents rely on a series of incorrect assumptions and unfounded logical leaps. Tellingly, every designated public forum case Respondents cite involves fora that were unquestionably controlled by the government itself. Resp. Br. at 23-26.

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[3] At one point Respondents appear to argue "joint action" with the City (Resp. Br. at 57-58), but do not allege *any* City participation in the challenged conduct. They also acknowledge that the mere allegation that MNN's "existence derives from sovereign acts" would be insufficient (which it is, under *Lebron*, 513 U.S. at 399-400). Resp. Br. at 58.

A. *The PSC Regulations Do Not Create Constitutional Public Fora*

Respondents' main argument is that New York's "first-come, first-served, nondiscriminatory" regulation for public access automatically creates *constitutional* designated public fora—even without a requisite showing of state action. Resp. Br. 26-32. This is wrong for several reasons.

1. Respondents Misconstrue "First-Come, First-Served"

Respondents are simply wrong about what "first-come, first-served," "nondiscriminatory" means in the PSC regulations. Respondents argue that the "first-come, first-served" language strips MNN of all editorial discretion. It is that lack of editorial discretion, according to Respondents, that renders MNN's channels designated public fora. Resp. Br. at 29. They contrast this lack of discretion with other public access channels that are allowed to "curate" content. *Id.* at 30-31.

This is a false distinction. In fact, MNN *is* able to curate content on its public access channels. This authority comes directly from the Grant Agreement, which provides that MNN "may dedicate segments of Public Access Channel time and/or specific channels to particular or related subject matters or uses." Resp. App. at 31a, § 3.3.01; *see also id.* at § 3.1 ("[MNN] shall … (ii) develop and support programming to be cablecast on the Public Access Channels, which is responsive to the needs and interests of the Residents of the Borough."). In addition to being able to curate content, MNN, like other access organizations, also produces its own original program-

ming, over which it has full editorial control. *See id.* at 26a, 31a, § 3.1.

The PSC also approved the Franchise Agreement, which attached a copy of the Grant Agreement. 16 NYCRR § 895.1 (discussing requirements for franchise to be confirmed or approved by PSC). In addition, the PSC has specifically ruled that public access channel operators in New York *may* curate content and produce (and air) their own shows. *See, e.g., Amano v. City of New York*, No. 04-V-0321, 2006 WL 4470759, at *3-5 (N.Y.P.S.C. Aug. 30, 2006) (allowing New York public access channel operator to curate and place content on specific channels). Thus, the distinction Respondents try to draw—between MNN on one end of the spectrum, and "[m]ost other states" that "allow public access channels to curate content" (Resp. Br. at 1), on the other end—is factually wrong and, in any event, irrelevant.[4]

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[4] Other state and local schemes do not "differ markedly from New York's [public access scheme]." Brief Amici Curiae of the American Civil Liberties Union et al. at 13-15 ("ACLU Br."). Respondents argue that there "is no evidence that Illinois or Chicago has adopted a first-come, first-served policy." Resp. Br. at 44 n.18. But, much like the PSC regulations, Chicago Municipal Code § 4-280-360(A)(2) states unequivocally that CAC is to "[a]llocate access channel space and time, and access channel interconnections for nonprofit use, on a reasonable ***nondiscriminatory*** basis" (emphasis added). Similarly, the local Idaho statute the ACLU cites is an Educational and Government access channel, ***not*** a "public access channel." ACLU Br. at 13-14 (citing Coeur d'Alene, Idaho, Mun. Code § 2.100.010). Moreover, that local municipalities in Tennessee and Ohio allow public access channels to air content of local relevance (ACLU Br. at 14) is no different than MNN's mandate to curate and create content "responsive to the needs and interests of the Residents of the Borough." Resp. App. at 31a, § 3.1. None of these

A perverse consequence of Respondents' argument would be that the cable operators (Time Warner Cable, Comcast, etc.), which are expressly forbidden from having any editorial control over public access channels under the 1984 Cable Act, 47 U.S.C. § 531(e), would all necessarily be state actors wherever they operate public access channels (as they do in many states including New York).

Respondents' argument that New York's "first-come, first-served" regulation is what creates a public forum is also inconsistent with the Second Circuit's decision. The Second Circuit *did not* find that this requirement was unique to New York, nor did it hold that the requirement rendered public access channels in Manhattan public fora. *See* Pet. App. 3a-5a, 13a-15a. Respondents' brief glosses over what the Second Circuit actually found relevant in finding that MNN operated a public forum.

2. The City Does Not Own Or Control Manhattan's Public Access Channels

Recognizing that a *constitutional* designated public forum is a "government-controlled space[]" (*Minnesota Voters*, 138 S. Ct. at 1885), Respondents argue for the first time that New York "owns and controls its public access channels." Resp. Br. at 33. But the Amended Complaint is devoid of any such allegation, and neither Respondents nor the courts below ever considered these public access channels anything other than privately-owned. *See* Brief for Plaintiffs-Appellants at 16-20, *Halleck v. Manhattan Cmty. Ac-*

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examples indicate that MNN has any less editorial discretion than other public access channel operators.

cess Corp., No. 16-4155 (2d Cir. Feb. 2, 2017) (Doc. 1960753); Reply Brief for Plaintiffs-Appellants at 6-8, *Halleck v. Manhattan Cmty. Access Corp.*, No. 16-4155 (2d Cir. Mar. 23, 2017) (Doc. 1996166); Pet. App. 9a, 11a-13a (citing *Denver Area*, 518 U.S. at 742, 791-94, 826-31); Pet. App. 44a-45a, 48a-49a.

Respondents' new *ownership* argument—made without a factual record *or even allegations*—mischaracterizes the Franchise Agreement. That agreement did not "create" any public access channels for the City to "own" or "control," nor did it include any transfer of property rights to the City. Rather, as part of the agreement, Time Warner Cable agreed to set aside bandwidth on the system *it owns* for public access use by MNN, not the City. *See, e.g.*, Resp. App. at 25a (representing that "the Franchise Agreement requires Time Warner Cable to make available CAO Access Channels on [Time Warner's] System, to be known as public access channels"); *id.* at 32a-33a, ¶ 4.2.01 ("Time Warner Cable shall carry Public Access Channels as provided in its franchise….").

In *Denver Area*, Justice Thomas observed that franchise agreements do not create any such property rights in favor of the municipality, recognizing that, while "[p]ursuant to federal and state law, franchising authorities require cable operators to create public access channels, … nothing in the record suggests that local franchising authorities take any formal easement or other property interest in those channels that would permit the government to designate that property as

a public forum." 518 U.S. at 828.[5] Moreover, MNN indisputably owns and controls the physical assets necessary for the production of content on its channels, *e.g.*, the studios, transmission facilities, cameras, and editing stations, all of which are essential to production and transmission of content on public access channels.[6] Pet. App. 37a; JA-23-25, ¶¶ 34-38.

Respondents cite several inapplicable lower court opinions to argue that some privately-owned property is "subject to a public easement." Resp. Br. at 41 n.17. But these cases involved real property—privately-owned *sidewalks*, which *pursuant to recorded agreements* between municipalities and the

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[5] Further underscoring how inappropriate it is to characterize public access channels as *constitutional* public fora, Justice Thomas explained in *Denver Area*: "in no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf." 518 U.S. at 829. Justice Thomas concentrated on the public access channel operator's role in accepting and scheduling programming and providing production facilities and assistance—functions MNN performs. *Id.* at 830. Justice Thomas concluded, "the[se] numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of the public forum." *Id.* at 831. Respondents' strange suggestion that Justice Thomas's dissent in *Denver Area* did not apply to public access channels is belied by the opinion. Resp. Br. at 39-40.

[6] While Respondents state that the Franchise Agreement "conferred on the City a legally-enforceable right to *place content* on Time Warner's cable system" (Resp. Br. at 43 (emphasis added)), this would be true only in connection with Government/Educational Access Channels, not Public Access. Resp. App. at 15a-16a, §§8.1.7.2-.4.

private owners, were made available for public use. *See First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1118, 1131 (10th Cir. 2002); *Venetian Casino Resort, LLC v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001).

Moreover, streets, sidewalks, and parks are in their own constitutional category because they are the "archetype of a traditional public forum" (*Frisby v. Schultz*, 487 U.S. 474, 480 (1988)), "hav[ing] 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 Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). And this Court "has rejected the view that traditional public forum status extends beyond its historic confines." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (quoting *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998)).

Therefore, any attempt to equate streets and public access television channels—which are just a few decades old—fails. *See, e.g.*, *U.S. v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205-06 (2003) (Internet access in public libraries "did not exist until quite recently"; "[t]he doctrines surrounding traditional public forums may not be extended to situations where such history is lacking").[7]

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[7] In the sidewalk cases, the courts were persuaded by "the historically public character of [the sidewalks]" and their "interconnection with [the abutting] network of public sidewalks." *Venetian*, 257 F.3d at 943, 948. Here, to a channel surfer, Manhattan's public access channels are indistinguisha-

More importantly, Respondents' pleading does not—and cannot—allege that the City "controls" Manhattan's public access channels in any way. To the contrary, Respondents concede that the City: can nominate only two of MNN's 13 board members; has no right to create, approve, or revise MNN's internal rules; does not fund MNN or own its property or assets; and (unlike MNN) is not allowed to exercise editorial control over channel content. JA-22-23, ¶¶ 29, 33, 35-36; Resp. Br. at 6, 8-9. Indeed, Respondents have not alleged that the City has the power to exercise *any* degree of control over public access channels.

Any suggestion that the City controls the public access channel is further belied by the language of the Franchise Agreement, which defines Public Access Channels as "Access Channel[s] which Franchisee shall make available *to the CAO*." Pet. Reply App. 1a, § 1.46 (emphasis added).[8] Moreover, Sections 8.1.8 and 8.1.9 expressly state that the public access channels are under MNN's "jurisdiction" "for the purpose of distributing noncommercial services by the public [and] other charitable, nonprofit purpose…." Resp. App. 16a-17a. This is in stark contrast to the Franchise Agreement's discussion of Government/Educational Access Channels, which are placed "under the jurisdiction *of the Mayor* … for noncommercial *use of the City [and City educational agencies]*." *Id.* at 15a, § 8.1.7.2 (emphasis added). Finally, the Grant Agreement allows MNN to "use

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ble from the *nonpublic* cable channels that precede and follow them.

[8] Respondents did not include this section of the Franchise Agreement in their appendix.

the Public Access Channels … as deemed necessary *by the Board of Directors of [MNN].*" *Id*. at 31a, § 3.1 (emphasis added).

Ignoring this clear language, Respondents argue—for the first time—that the City somehow has "*express authority*" to remove MNN as the operator of the public access channel. Resp. Br. at 19 (emphasis added). But there is no "express" authority in either the Franchise Agreement or the PSC regulations. The operative regulations and agreements do not address removal at all; and there is no reason to infer that such authority exists.

But even if the City has the authority to replace MNN and designate another organization to run Manhattan's public access channels, so what? This speculative, latent authority is not indicative of government control. Is a private driveway a public forum because the city *could* take it by eminent domain? Congress, of course, *could* have repealed the act that gave rise to the U.S. Olympic Committee; yet, despite this latent theoretical ability to revoke the entity's designation, this Court held that it was not a state actor. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544-47 (1987). The FCC *could* revoke a broadcaster's license, but this does not give the government power to control the station's content. Respondents' argument about hypothetical, unexercised power does not constitute the type of "control" that would make MNN a state actor or Manhattan's public access channels public fora.

3. Respondents' Attempts to Narrow the Consequences of Their Argument Fail

Respondents stress that "whether *all* public access channels are a public forum … is simply not our argument." Resp. Br. at 29. Instead, they argue that the impact of this case is limited because New York's public access regime is "unique"—different, in specific ways that Respondents suggest are meaningful—from public access in other places. Resp. Br. at 29 & n.10 ("Our position is governed by the unique features of New York law."). But in their Amended Complaint, Respondents attributed to *all* public access channels the characteristics they now call "unique features of New York law." *Id.* Respondents alleged:

> 19. Cable public access channels typically are available for the free use of the public on a first-come, first-served, nondiscriminatory basis.

JA-20. Because this Court is reviewing the disposition of this case on a Rule 12(b)(6) motion, Respondents' pleadings cannot simply be ignored.

Moreover, nondiscriminatory access—however it is phrased—has been part of the very fabric of public access television since its inception. As early as 1972, the FCC characterized public access channels as "a specific noncommercial channel [] set aside for community use. Anyone in the community can have access to this channel on a first come, first served basis, free of charge." Barry Janes, *History and Structure of Public Access Television*, 39(3) J. Film & Video 14, 14 (1987). In *Denver Area*, Justice

Kennedy recognized that "[t]he public access channels *established by franchise agreements* tend to have certain traits. They are available at low or no cost to members of the public, often on a first-come, first-served basis." 518 U.S. at 791 (emphasis added)).

Nor is "first-come, first-served" or "nondiscriminatory" language in state or local laws or regulations (or franchise agreements) at all "unique" to New York; it is ubiquitous. *See, e.g.*, D.C. Code § 34-1251.03(28) (District of Columbia); Haw. Code R. § 16-131-32 (Hawaii); 815 R.I. Code R. 010-05-1.14.1(B)(1) (Rhode Island); Vt. Code R., tit. 30, ch. 8000, § 8.100(FF) (Vermont); Aurora, Illinois Code of Ordinances, ch. 19, § 19-41(b)(1); Chicago, Illinois Municipal Code § 4-280-360; Laurel, Maryland Code of Ordinances, ch. 5, § 5-8(b); Vienna, Virginia Code of Ordinances, ch. 24, art. 7, § 24-25(3); Guidelines for Community Television & PEG Access Policies, Foxboro Cable Access, https://www.fcatv.org/policy/#What_is_FCA.

Finally, Respondents' localism argument is a red herring. Petitioners do not argue that municipalities cannot decide for themselves how to structure public access television operations. Indeed, a channel structured with extensive, ongoing government control and involvement would command a different result. *See, e.g.*, *Brennan v. William Paterson Coll.*, 34 F. Supp. 3d 416, 419-21, 426-30 (D.N.J. 2014) (township owned public access channel, which state university controlled and operated); *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 52-53 (D. Me. 2002) (municipality itself restricted plaintiff's speech by shutting down public access channel). Here, nothing in the Amended Complaint warrants treating New

York's public access television channels as constitutional public fora.

III. RESPONDENTS' AND THEIR AMICI'S ADDITIONAL STATE ACTION ARGUMENTS ARE LEGALLY AND FACTUALLY WRONG

Amici curiae the American Civil Liberties Union *et al.* argue that Respondents need not satisfy *any* of this Court's prior state action tests. ACLU Br. at 16-32. Rather, according to Respondents and the ACLU, MNN has no editorial discretion, its actions are therefore somehow compelled by the state, and it is therefore a state actor. *Id.* at 4-7, 10-11, 19-24.

This Court has consistently rejected that argument. That MNN is subject to regulation does not turn it into a state actor. Even where there is "extensive state regulation of private activity, we have consistently held that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the [Constitution].'" *Sullivan*, 526 U.S. at 52 (quoting *Jackson*, 419 U.S. at 350).

Rather, "a plaintiff must show that the government compelled the *particular activity* that allegedly caused the constitutional injury." Pet. App. at 24a (Jacobs, J. dissenting) (emphasis added); *see also Jackson*, 419 U.S. at 357 (public utility regulations "do[] not transmute a practice initiated by the utility and approved by the commission into 'state action'" where the state "has not put its own weight on the side of the proposed practice by ordering it"); *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982) (medical regulations do not "demonstrate that the State is responsible for the decision to discharge or transfer particu-

lar patients"); *see also Rendell-Baker*, 457 U.S. at 841-42 (distinguishing between state regulation of school and lack of state regulation over challenged personnel decision).[9]

Here, the constitutional injury that Respondents allege is their suspension from MNN and its facilities. JA-17, 38-39, ¶¶ 2, 128-29, 133. Neither the Grant Agreement nor the PSC regulations speak to suspensions or disciplinary actions; these are actions taken at MNN's discretion, in this case after the program had already been aired. Indeed, the Franchise Agreement between the City and Time Warner Cable authorizes MNN to create its own internal rules and regulations. Resp. App. 16a, § 8.1.8. It is pursuant to these internal rules—not the PSC regulations—that MNN suspended Respondents. JA-34-35, ¶¶ 109, 114; *see also Sullivan*, 526 U.S. at 52 ("Action taken by private entities with the mere approval or acquiescence of the state is not state action."); *see also Albert v. Carovano*, 851 F.2d 561, 571 (2d Cir. 1988) ("even if the state had specifically required … Hamilton [College] to adopt the precise rules …, the ultimate power to select a particular sanction in individual cases would, as in [*Blum*], rest with the private party").

For this reason, reliance on *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), is misplaced. In *Adickes*, the Court remanded for further fact-finding to determine whether there was a "state-enforced custom

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[9] In *Nat'l Collegiate Athletics Ass'n v. Tarkanian*, 488 U.S. 179 (1988), this Court considered (and rejected) the inverse argument: that a private entity was alleged to have exerted so much control over the public entity that the public entity's conduct was essentially compelled by the private entity. *Id.* at 198-99.

of segregating the races in public eating places" and whether a private restaurant acted under compulsion of such a custom in racially discriminating—which would constitute state action. *Id.* at 173-74. Here, by contrast, there are absolutely no allegations that MNN was acting under a state-enforced custom, law, or any other state directive. The alleged constitutional violation relates to disciplinary actions and purported viewpoint discrimination that are in no way compelled by the relevant state regulations.

The argument that lower courts have found state action where "government standards, rather than private-sector standards, dictate the result a nominally private actor must reach" fares no better. ACLU Br. at 22. The cases cited for this proposition found state action because of the *active role* of the government in the constitutionally-suspect decision. These are essentially "joint action" cases. For example, in *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263 (11th Cir. 2003), the Eleventh Circuit relied on record evidence that a state transportation agency was the entity that rejected a proposed advertisement on a public bus shelter. The private advertising company with whom it contracted to construct the bus shelter merely relayed this rejection to the aggrieved plaintiff. The court held that for purposes of summary judgment only, it was persuaded that the "private actor is merely a surrogate for the state, and the tie between them is sufficiently strong for the nexus/joint action test to be satisfied." *Id.* at 1278-79. Similarly, in *U.S. v. Stein*, 541 F.3d 130 (2d Cir. 2008), the Second Circuit found that the government was involved in creating KPMG's policy regarding the payment of attorneys' fees for indicted employees; and the govern-

ment continued to intervene in KPMG's decision-making in order to encourage witness cooperation. This amounted to "'overt' and 'significant [government] encouragement.'" *Id.* at 148.

Moreover, if Respondents were correct that MNN improperly exercised editorial discretion *in contravention of state regulation*, then MNN could not have been acting "under color of state law" in injuring Respondents. *See* CAC Br. at 4-11. Indeed, to the extent that MNN was acting "contrary to the relevant policy articulated by the State" in allegedly discriminating against Respondents, their injury "could not be ascribed to any governmental decision." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 938, 940 (1982); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-77 (1972) (private fraternity's decision to discriminate could not be ascribed to any governmental decision because, even if the regulation by the Pennsylvania Liquor Control Board was "pervasive," that regulation "cannot be said to in any way foster or encourage racial discrimination" or "make the State in any realistic sense a partner or even joint venture in the club's enterprise").

For this reason, Respondents' and their *amici's* concern that a state actor's breach of *any* state law would undermine a constitutional claim against that state actor (*see* ACLU Br. at 25-27) is misplaced. The relevant inquiry is whether the *challenged conduct* finds its source in a state law or policy.[10]

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[10] The ACLU's example of MNN rejecting content it deems unprotected by the First Amendment is meaningfully different than what Respondents allege happened here. ACLU Br. at 25-27. MNN unquestionably *has* statutory authority not to air content that has no First Amendment protection, *see* 16 NYCRR 895.4(c)(8), and would therefore be acting "pursuant to"

IV. THE COURT CONSIDERS THE SUFFICIENCY OF THE PLEADINGS ON A 12(B)(6) MOTION TO DISMISS

Respondents have included a raft of allegations that appear nowhere in their Amended Complaint. But this Court will "not rely on … evidence first introduced to this Court [that] 'is not in the record of the proceedings below.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990) (quoting *Adickes*, 398 U.S. at 157 n.16).[11] The issues here are whether the district court correctly granted Petitioners' motion to dismiss, *see* Pet. App. 40a-41a (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)), and whether the Second Circuit was correct in reversing that decision and determining—*on the pleadings*—that MNN and its employees are state actors.

It bears emphasizing that the district court afforded Respondents the opportunity to re-plead (after learning the basis on which Petitioners sought dismissal), cautioning that they would not be afforded another chance. JA-8-9, 51-52. Respondents had ample opportunity to plead sufficient allegations and cannot introduce new purported facts on appeal to buttress their inadequate allegations.

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the state statute. ACLU Br. at 25. Here, Respondents state that MNN took actions that are not authorized by statute.

[11] In any event, this purported history is not dispositive in determining the constitutional character of the public access channels. As this Court has observed regarding *Lebron*, it is the nature of the government's "control and supervision" that governs the nature of a forum. *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1233 (2015).

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 11, 2019

Appendix

APPENDIX

Cable Franchise Agreement

by and between

The City of New York

and

Time Warner Entertainment Company, L.P.

***

THIS AGREEMENT (this "Agreement") is entered into by and between the City of New York ("the City"), a validly organized and existing political subdivision of the State of New York, and Time Warner Entertainment Company, L.P., a limited partnership duly organized under the applicable laws of the State of Delaware ("Franchisee").

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1.46 *Public Access Channel*: An Access Channel which Franchisee shall make available to the CAO, at no charge, as provided, and for the purposes described, in Article 8 of this Agreement.

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