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INTRODUCTION

In *Manhattan Community Access Corp. v. Halleck*,[1] the Supreme Court considered whether a public access channel operator could be considered a state actor for First Amendment purposes.[2] The Court found that the operation of a public access channel "is not a traditional, exclusive . . . function" of a government.[3] The Court also rejected the views that a public access channel is a public forum;[4] that mere regulation of a public access operator confers status as a state actor;[5] and that the municipal franchising authority obtained a property interest in the public access channels.[6] However, the Court brushed aside prior decisions supporting the conclusion that a municipal franchisor had a property interest in public access channels sufficient to justify concluding that such channels are a constitutional public forum.[7] Additionally, the Court disregarded relevant facts and circumstances that would justify a finding of state action based on entwinement between the city and the public access operator.[8]

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1. 139 S. Ct. 1921 (2019).
2. *Id.* at 1926.
3. *Id.* at 1930.
4. *Id.*
5. *Id.* at 1932.
6. *Id.* at 1933.
7. *See infra* Part IV.A.
8. *See infra* Part IV.B.

Manhattan Community Access Corp. v. Halleck

I. THE CASE

Respondents DeeDee Halleck and Jesús Papoleto Meléndez, two community media producers based in New York City, developed a contentious relationship with the Manhattan Community Access Corp., locally known as the Manhattan Neighborhood Network ("MNN"), between 2011 and 2015.[9] Halleck is a media activist and Professor Emerita of the Department of Communication at the University of California, San Diego,[10] and has been active in Manhattan public television since the 1970s.[11] Meléndez is a Nuyorican poet and playwright who grew up in East Harlem[12] and has been active assisting Harlem youth and senior citizens in producing content for public television since the 1990s.[13] MNN is a non-profit corporation that operates public access channels for broadcast on cable television systems in Manhattan.[14] After MNN suspended Halleck and Meléndez from using MNN's facilities, the two media producers filed suit in October 2015[15] against MNN, several of its officers, and the City of New York under 42 U.S.C. §§ 1983 and 1988[16] for violating their First Amendment[17] rights.[18]

Prior to December 2011, Halleck and Meléndez had been regular producers of public access television content in Manhattan.[19] In December 2011, Halleck attempted to attend a MNN board meeting to discuss the reinstatement of a

9. *See generally* First Amended Complaint 39–124, Halleck v. City of New York, 224 F. Supp. 3d 238 (S.D.N.Y. 2016)(No. 15-cv-08141), ECF No. 39, https://www.courtlistener.com/recap/gov.uscourts.nysd.448711/gov.uscourts.nysd.448711.39.0.pdf.

10. *DeeDee Halleck*, DEP'T OF COMMC'N, UNIV. OF CAL. SAN DIEGO, https://communication.ucsd.edu/people/profiles/halleck-deedee.html (last visited Dec. 19, 2020).

11. First Amended Complaint, *supra* note 9, 39.

12. *Jesús Papoleto Meléndez*, POETRY FOUND., https://www.poetryfoundation.org/poets/jesus-papoleto-melendez (last visited Dec. 19, 2020).

13. First Amended Complaint, *supra* note 9, 40.

14. Manhattan Cmty. Access Corp. v Halleck, 139 S. Ct. 1921, 1926 (2019).

15. Joint Appendix at 6, Manhattan Cmty. Access Corp. v Halleck, 139 S. Ct. 1921 (2019) (No. 17-1702), http://www.supremecourt.gov/DocketPDF/17/17-1702/74098/20181204145550699_17-1702%20Joint%20Appendix.pdf.

16. In relevant part, § 1983 creates a cause of action against any person who, acting under color of law, deprives another of a constitutionally protected right. 42 U.S.C. § 1983 (2018). In such a suit, § 1988 authorizes the award of costs and attorney's fees to the prevailing party. 42 U.S.C. § 1988(b) (2018).

17. In relevant part, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

18. First Amended Complaint, *supra* note 9, 1. In addition to their First Amendment claim, Halleck and Meléndez included supplemental claims under the free speech protection of the New York State Constitution and a violation of the New York Open Meetings Law. *Id.* 134–43. These supplemental claims under state law were dismissed by the District Court for lack of subject matter jurisdiction after it dismissed the First Amendment claim, the sole federal law claim. Halleck v. City of New York, 224 F. Supp. 3d 238, 247 (S.D.N.Y. 2016), *aff'd in part, rev'd in part sub nom.* Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300 (2d Cir. 2018), *rev'd*, 139 S. Ct. 1921 (2019). This Note addresses only the First Amendment claim.

19. First Amended Complaint, *supra* note 9, 39–40.

community media grant and a youth program.[20] Petitioner Daniel Coughlin, then Executive Director of MNN,[21] denied Halleck entry and informed her that the board meetings are closed to the public.[22] Subsequently, Halleck and Meléndez were invited by Coughlin to attend the March 2012 board meeting.[23] However, when Halleck attempted to videotape the meeting, Coughlin abruptly brought the meeting to a close.[24]

Meléndez was invited in January 2012 to participate in MNN's Community Leadership Program (CLP) by Iris Morales, the director of MNN's El Barrio Firehouse facility.[25] The CLP was a 10-week training program in media production intended for "individuals of artistic merit and community commitment . . . ."[26] Meléndez attended the March 14, 2012, MNN board meeting with Halleck, which was on the same evening as one of the CLP training sessions.[27] Meléndez returned to the CLP session after the board meeting's abrupt adjournment.[28] Shortly after Meléndez returned to the training session, Morales pulled Meléndez out to talk to him outside.[29] Once outside, Morales screamed at Meléndez, apparently upset with him for attending the board meeting with Halleck.[30] At the next week's CLP training session, on March 21, Meléndez learned that he was "barred from participation" in the CLP.[31] When Meléndez met with Morales at the El Barrio Firehouse two days later, on March 23, to discuss the situation, Meléndez alleges that Morales screamed at him again, "threw crumpled papers at him, and [physically] struck him . . . ."[32] When a security guard showed up to investigate the commotion, Meléndez left the firehouse.[33] In April 2012, Coughlin informed Meléndez by letter that he had been removed from the CLP as a result of the confrontation with Morales.[34] However, Meléndez asserts in the complaint that the real reason for his removal was his association with Halleck at the March 2012 MNN board meeting.[35] This assertion is bolstered by the letter's reference to the March 23 confrontation

20. *Id.* 41–42.
21. *Id.* 12.
22. *Id.* 43.
23. *Id.* 49.
24. *Id.* 55.
25. *Id.* 45.
26. *Id.* 46–47.
27. *Id.* 53–54.
28. *Id.* 56.
29. *Id.* 57–58.
30. *Id.* 59, 71.
31. *Id.* 62.
32. *Id.* 64–65.
33. *Id.* 67–68.
34. *Id.* 69–70.
35. *Id.* 71.

with Morales that only took place after Meléndez had already been barred from attending the CLP training session on March 21.[36]

In July 2012, the situation escalated further at the formal opening of the El Barrio Firehouse, an invitation-only event attended by "a select group of public officials, including then Manhattan Borough President Scott Stringer" and a New York City Council member.[37] Although Halleck and Meléndez were not invited to the event, they stood outside the firehouse facility and attempted to interview attendees.[38] Jose Angel Figueroa, a member of the CLP, responded to Halleck's attempt to interview him by uttering profanity at Halleck and Meléndez.[39] When Meléndez verbally reciprocated the sentiment, Figueroa moved towards Meléndez as if to physically strike him.[40] After a security guard intervened, Figueroa entered the firehouse, leaving Halleck and Meléndez outside to continue interviewing the arriving guests.[41] Later at the event, Meléndez remarked to Halleck that he thought it was ironic that he was being kept out of the El Barrio Firehouse facility by "our people, people of color" and that he would have to wait until "they are fired, or they retire, or someone kills them" before he would have access to the MNN facility.[42]

After the El Barrio Firehouse opening event, Halleck submitted her program "The 1% Visits El Barrio" to MNN for broadcast.[43] Halleck's program contained the interviews conducted by Halleck and Meléndez from the El Barrio Firehouse event.[44] MNN aired the program on October 2, 2012.[45] Halleck's program presented the respondents' opinion that MNN is "more interested in pleasing 'the 1%' than addressing the community programming needs" of East Harlem residents.[46] After airing Halleck's program, MNN notified Halleck that she had been suspended from using MNN's facilities for three months as a result of her program.[47] Specifically, MNN described Meléndez's statement that he would have to wait for access to the El Barrio Firehouse facility until the staff were "fired, or they retire, or someone kills them" as an incitement to violence, in contravention of MNN's content policies.[48]

36. *See id.* 62, 70.

37. *Id.* 72–73.

38. *Id.* 74.

39. *Id.* 75–76; *see also* DeeDee Halleck, *The 1% Visits El Barrio; Whose Community?*, YOUTUBE, at 01:42 (July 29, 2012), http://youtu.be/QEbMTGEQ1xc.

40. First Amended Complaint, *supra* note 9, 77–78; *see also* Halleck, *supra* note 39, at 01:50.

41. First Amended Complaint, *supra* note 9, 79–80; *see also* Halleck, *supra* note 39, at 01:56.

42. First Amended Complaint, *supra* note 9, 81; *see also* Halleck, *supra* note 39, at 21:20.

43. First Amended Complaint, *supra* note 9, 82–83; *see generally* Halleck, *supra* note 39.

44. First Amended Complaint, *supra* note 9, 83.

45. *Id.* 84.

46. *Id.* 83.

47. *Id.* 85–86.

48. *Id.* 86–87.

Halleck protested the suspension, arguing that Meléndez's statement was "expressing his despair" at the situation, not inciting violence.[49] Halleck argued that the suspension was, in reality, a result of her questioning "the transparency and accountability of MNN's management."[50]

The following year, in July 2013, Halleck and Meléndez had a chance meeting with Coughlin at a party hosted by a mutual friend.[51] Meléndez attempted to engage in a polite discussion with Coughlin about Meléndez's status at MNN.[52] However, after Coughlin rebuffed Meléndez's attempt at "a constructive discussion, . . . Halleck led . . . Meléndez away."[53] A few weeks later, in a letter citing the events over the past 18 months, Coughlin suspended Meléndez's access to MNN facilities indefinitely for violation of MNN's "zero-tolerance" policy regarding harassing or threatening behavior toward MNN associates.[54] Citing similar concerns, as well as the number of complaints[55] MNN received about Halleck's "The 1% Visits El Barrio" video, Coughlin suspended Halleck's use of MNN facilities for one year.[56]

MNN confirmed in April 2015 that Meléndez's indefinite suspension remained in effect when Meléndez attempted to submit a new project for airing.[57] Further, although Halleck's suspension has ended, Halleck has been unable to air any program containing Meléndez on MNN, including "The 1% Visits El Barrio," because of Meléndez's indefinite suspension.[58]

Respondents filed their Complaint in the U.S. District Court for the Southern District of New York on October 15, 2015,[59] and they filed their First Amended Complaint on February 19, 2016.[60] Halleck and Meléndez asserted a claim against the City of New York, MNN, and three MNN officers for violating their First Amendment rights under 42 U.S.C. § 1983, as well as supplementary state law claims under similar provisions of the New York constitution and the New York Open Meetings Law.[61] Halleck and Meléndez sought injunctive relief, as well as compensatory and punitive damages.[62] The district court granted the defendants'

49. *Id.* 91–92.

50. *Id.* 93.

51. *Id.* 98.

52. *Id.* 99.

53. *Id.* 103.

54. *Id.* 104–09.

55. Coughlin's letter did not provide details about the complaints, other than that they related to Halleck's public posting of her "The 1% Visits El Barrio" program on YouTube. *Id.* 113.

56. *Id.* 111–14.

57. *Id.* 117–19.

58. *Id.* 116.

59. Joint Appendix, *supra* note 15, at 6.

60. *Id.* at 9; *see generally* First Amended Complaint, *supra* note 9.

61. First Amended Complaint, *supra* note 9, 1–2.

62. *Id.* A–D.

motion to dismiss for failure to state a claim with respect to the First Amendment claim.[63] Having dismissed the only federal claim, the district court declined to exercise jurisdiction over the state law claims.[64]

On appeal, the Second Circuit affirmed the dismissal with respect to the City of New York on the theory that the City had not taken action sufficient to give rise to liability for Halleck's and Meléndez's claims.[65] However, the Court of Appeals reversed the district court's dismissal with respect to MNN and its employees on the basis that MNN operates a public forum under authority delegated by the municipality.[66] In a dissenting opinion, Judge Jacobs asserted that the reversal with respect to MNN is inconsistent with Second Circuit precedent and also creates a circuit split with the Sixth Circuit.[67] The Supreme Court granted certiorari to resolve the circuit split.[68]

II. LEGAL BACKGROUND

The Court's reasoning in *Halleck* is based on the state-action doctrine, as applied in light of the tumultuous history of regulation of public access cable channels.[69] Federal regulation of public, educational, and government access channels ("PEG channels") developed slowly from the origin of cable television in the 1950s and 1960s but accelerated rapidly at the onset of the 1970s.[70] The contemporary regulatory environment, as applied to MNN, solidified with the enactment of the Cable Communications Policy Act of 1984.[71] However, despite several cases discussing the legal status of PEG channels, the Court had not previously given clear guidance as to whether a PEG channel is a public forum for constitutional purposes.[72]

The Supreme Court has routinely held that actions by a private entity cannot give rise to a constitutional violation unless the private action can be fairly attributed to

63. Halleck v. City of New York, 224 F. Supp. 3d 238, 243, 247 (S.D.N.Y. 2016), *aff'd in part, rev'd in part sub nom.* Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300 (2d Cir. 2018), *rev'd*, 139 S. Ct. 1921 (2019).

64. *Id.* at 247.

65. Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 308 (2d Cir. 2018), *rev'd*, 139 S. Ct. 1921 (2019).

66. *Id.* at 307–08.

67. *Id.* at 314 (Jacobs, J., concurring in part and dissenting in part).

68. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1927–28 (2019) (noting the split in authority between the Second Circuit's *Halleck* decision and the outcomes of Wilcher v. City of Akron, 498 F.3d 516 (6th Cir. 2007), and Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995)).

69. *See infra* Part III.

70. *See infra* Part II.B.

71. *See infra* notes 144–47 and accompanying text; *see also Cable Franchise Agreement by and Between the City of New York and Time Warner NY Cable LLC*, CITY OF NEW YORK § 1.8, https://www1.nyc.gov/assets/doitt/downloads/pdf/time_warner_cable_franchise_agreement_manhattan_north.pdf (last visited Dec. 19, 2020) (defining "Cable Act" as "The Cable Communications Policy Act of 1984").

72. *See infra* Part II.B.

the state.[73] This has led, over time, to the development of the state-action doctrine, under which only state actors—not private actors—can be held liable for constitutional violations.[74] However, as the Court has observed, "cases deciding when private action might be deemed that of the state have not been a model of consistency."[75] Although the Court emphasizes that the facts and circumstances of any given case will determine whether state action is present, there are some tests that the Court has developed to distinguish private action from state action.[76]

A. State-Action Requirement in Constitutional Violations

The First Amendment's freedom of speech guarantee protects only against governmental interference, not private interference.[77] Courts apply the state-action doctrine to demarcate the boundary between proscribed governmental interference and permitted private interference with free speech rights.[78] There are multiple potential avenues to a finding of state action, the most relevant of which are: the exercise by the private entity of a traditional, exclusive public function; governmental encouragement of the private actor; and joint activity or entwinement between the government and the private actor.[79]

The leading case on the exclusive public function test is *Jackson v. Metropolitan Edison Co.*[80] In *Jackson*, the Court reasoned that when a private actor exercises public functions "traditionally associated with sovereignty," state action is present.[81] In this case, the Court considered whether state action was present when an electric utility company cut off service to a customer without adequate notice.[82] The petitioner contended that state action was present because the state had granted the electric company a monopoly and required the company to provide "reasonably continuous" service within the state.[83] The Court rejected this argument because state law only imposed the service obligation on the utility company, not on the state itself.[84] Supplying electric service is not, the Court held,

73. *Halleck*, 139 S. Ct. at 1928.

74. *See id*.

75. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting).

76. *See infra* Part II.A.

77. *Halleck*, 139 S. Ct. at 1928.

78. *See id.*

79. *Id.* (citing first Jackson v. Metro. Edison Co., 419 U.S. 345, 352–54 (1974); then Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982); and then Lugar v. Edmonson Oil Co., 457 U.S. 922, 941–42 (1982)).

80. 419 U.S. 345, 352–53 (1974).

81. *Id.*

82. *Id.* at 347.

83. *Id.* at 347–48.

84. *Id.* at 353.

"traditionally the exclusive prerogative of the state."[85] As a result, the Court concluded that the utility company fell outside the ambit of the due process protections of the Fourteenth Amendment.[86]

The Court analyzed the governmental encouragement test in *Blum v. Yaretsky*.[87] The *Blum* respondents were patients at nursing facilities receiving federal financial assistance through the Medicaid program.[88] These patients challenged the decisions made by the nursing facilities to reduce their level of care under the Due Process Clause of the Fourteenth Amendment.[89] The patients argued that the state "affirmatively commands" the actions taken by the nursing facilities.[90] The Court found, to the contrary, that the state did not become responsible for the challenged actions by requiring the attending physician to complete an assessment form when attesting to the medical necessity of nursing care.[91] Although the state's form provided a numerical score, the physician was nonetheless authorized to recommend nursing care for patient despite giving the patient a low score on the assessment form.[92] Therefore, the Court found that the determination of medical necessity was rendered by the physician, using sound professional judgment, not an action of the state.[93] The Court also gave little weight to the fact that the state penalized nursing homes for failing to discharge or transfer patients who no longer had a medical need for care, since the decision about medical necessity was also left to the professional determination of physicians.[94] The Court further concluded that mere funding of the challenged activities by the state, even where that funding covered the care for 90% of patients in the covered care facilities, was insufficient to attribute responsibility for decision-making to the state for the purposes of satisfying the state action doctrine.[95]

The Supreme Court assessed joint action between the state and a private actor in *Burton v. Wilmington Parking Authority*.[96] In that case, Burton claimed discriminatory state action in violation of the Fourteenth Amendment when he was denied access to the Eagle Coffee Shoppe on account of his race.[97] Although the

85. *Id.*

86. *Id.* at 358.

87. 457 U.S. 991, 1004–05 (1982); *see also* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (describing *Blum v. Yaretsky* as a case assessing governmental compulsion of a private entity's action).

88. *Id.* at 993.

89. *Id.* at 996.

90. *Id.* at 1005.

91. *Id.* at 1006–07.

92. *Id.* at 1006.

93. *Id.* at 1006–07.

94. *Id.* at 1009–10.

95. *Id.* at 1011.

96. 365 U.S. 715, 725 (1961).

97. *Id.* at 716.

coffee shop was a private restaurant, the lessor of the premises was a Delaware state agency, the Wilmington Parking Authority.[98] The coffee shop was located in a parking garage building owned and operated by the Parking Authority.[99] When the Parking Authority built the parking garage, it used funds donated by the city and obtained by issuing bonds.[100] However, the parking revenues alone were not expected to be able to service the debt on the bonds.[101] As a result, the Parking Authority leased space in the building to commercial tenants, including the Eagle Coffee Shoppe.[102] Noting that the commercial leases were "a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit" and that the coffee shop's profits had become "indispensable elements" in the parking garage's success, the Court found adequate ground to attribute the coffee shop's actions to the state.[103] The state had "insinuated itself into a position of interdependence" with the coffee shop, and therefore the state was a joint participant in its activities.[104] As a result, the coffee shop was bound by the protections guaranteed under the Fourteenth Amendment.[105]

More recently, the Court expanded on the principles laid out in *Burton* and *Blum* in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.[106] In *Brentwood Academy*, the Court considered whether a not-for-profit corporation established to regulate high school sports could be subject to suit under the First and Fourteenth Amendments.[107] The Court determined that the "nominally private character" of the Athletic Association was overwhelmed by its "pervasive entwinement" with public entities.[108] The Court observed that: (1) the Association's membership was 84% public schools;[109] (2) membership in the Association's governing board was restricted to administrators of the member schools;[110] (3) employees of the Association were eligible to join the state's public employee retirement system;[111] and (4) the State Board of Education had the authority to

98. *Id.*
99. *Id.*
100. *Id.* at 718.
101. *Id.* at 719.
102. *Id.*
103. *Id.* at 723–24.
104. *Id.* at 725.
105. *Id.* at 726.
106. 531 U.S. 288 (2001).
107. *Id.* at 291, 293.
108. *Id.* at 298.
109. *Id.*
110. *Id.*
111. *Id.* at 291.

select nonvoting members of the Association's board.[112] The association received a small portion of its revenue from fees paid by member schools, but the majority of its revenue was derived from admission fees to its various athletic events.[113] In 1972, the State Board of Education had expressly designated the Association to supervise athletic activities of the state's public schools.[114] This express designation was replaced in 1996 with an authorization for public schools to join the Association voluntarily.[115] However, the Court found it significant that despite the removal of the formal designation, the State Board retained its authority to seat nonvoting members of the Association's board.[116] Further, Association employees were still permitted to participate in the state retirement system.[117] Taking into account all of the facts and circumstances, the Court held that the entwinement of between the state and the Athletic Association made the Association a state actor for constitutional purposes.[118]

B. Public, Educational, and Government Access Channels

When the first commercial cable television[119] system was established in 1950, there was no federal regulation of cable television.[120] In a 1959 order, the Federal Communications Commission ("FCC") determined that the FCC did not have plenary authority to regulate cable television systems under its statutory grant of power under the Communications Act of 1934.[121] At that time, the FCC sought to have Congress adopt additional legislation that would give the Commission authority over cable television, but the proposed bill failed.[122] However, despite the lack of additional statutory authority, the FCC began increasingly to regulate cable television systems over the course of the 1960s.[123] By 1966, the FCC concluded that it did have regulatory authority over cable television, and the Commission issued

112. *Id.* at 301.

113. *Id.* at 299.

114. *Id.* at 292.

115. *Id.* at 292–93.

116. *Id.* at 301.

117. *Id.*

118. *Id.* at 302.

119. The original nomenclature for cable television, used frequently in older documents, was "community antenna television" (CATV). *See* United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 651 n.3 (1972) (plurality opinion). For consistency, this Note will use the modern term: cable television.

120. *See generally* United States v. Sw. Cable Co., 392 U.S. 157, 161–67 (1968) (discussing the early history of cable television regulation).

121. *Id.* at 164; *see also* Inquiry into the Impact of Community Antenna Systems, 24 Fed. Reg. 3,004, 3,018, 26 F.C.C. 403, 441 (April 18, 1959).

122. *Sw. Cable*, 392 U.S. at 164–65.

123. *Id.* at 165.

new regulations[124] over the cable television industry.[125] When these new regulations were challenged, the Supreme Court held in *United States v. Southwestern Cable Co.*[126] that regulation of cable television did fall within the ambit of the FCC's authority under the Communications Act and thus upheld the challenged regulations.[127]

In 1969, the FCC went further in regulation of cable television to add the local origination rule.[128] Under this new rule, cable television systems with more than 3,500 subscribers were required to "operate[] to a significant extent as a local outlet by cablecasting[129] and ha[ve] available facilities for *local production and presentation* of programs other than automated services."[130] This concept of cablecasting was intended to "increas[e] the number of outlets for community self-expression" by encouraging production and distribution of locally produced programming, such as local news reports or presentations by local government officials.[131] One of the affected cable television operators, Midwest Video Corp., sued the FCC to set aside the new local origination rule on the basis that such a rule exceeds the statutory authority of the FCC.[132] In *United States v. Midwest Video Corp.* (*Midwest Video I*),[133] the Supreme Court once again upheld the regulations as within the Commission's authority, as previously recognized in *Southwestern Cable*.[134]

In a series of orders from 1972 to 1976, the FCC developed rules requiring cable television operators to maintain at least four channels for public, educational, local

124. The FCC's 1966 regulations on the cable television industry were the first regulation of television broadcasting by wire, as compared to previous regulation of CATV service by microwave radio. *Id.* at 166–67. The new regulations covered both microwave and cable service. *Id.* at 166. These regulations governed "carriage of local signals," as well as "nonduplication of local programming." *Id.* Additionally, the regulations forbade any new importation of distant signals into the 100 largest television markets, except where the FCC found it would be in the public interest to do so. *Id.* at 166–67.

125. *Id.* at 166; *see also* Amendments Relating to Community Antenna Television Systems, 31 Fed. Reg. 4,540, 4,548, 2 F.C.C.2d 725, 745 (Mar. 17, 1966).

126. 392 U.S. 157 (1968).

127. *Id.* at 178.

128. *Midwest Video I*, 406 U.S. 649, 653–54 (1972) (plurality opinion); *see also* First Report and Order, 34 Fed. Reg. 17,651, 17,653, 17,660, 20 F.C.C.2d 201, 208, 223 (Oct. 31, 1969); 47 C.F.R. § 74.1111 (1970) (repealed 1974).

129. Cablecasting, as defined at the time of the *Midwest Video I* decision, meant "programing distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." *Midwest Video I*, 406 U.S. at 653 n.6 (citing 47 C.F.R. § 74.1101(j) (1970)).

130. *Id.* at 653–54 (quoting 47 C.F.R. § 74.1111(a) (1970)) (emphasis added).

131. *Id.* at 654 (quoting First Report and Order, *supra* note 128, at 17,651, 20 F.C.C.2d at 202); First Report and Order, *supra* note 128, at 17,655–56, 20 F.C.C.2d at 213–14.

132. *Midwest Video I*, 406 U.S. at 657.

133. 406 U.S. 649 (1972).

134. *Id.* at 670.

governmental, and leased access.[135] In the midst of this process, the FCC repealed the earlier local origination rule.[136] Instead, cable operators were required to provide for "first-come, nondiscriminatory" use of the public access channel, without charge, subject to limited rules.[137] When Midwest Video Corp. brought a fresh challenge to the FCC's new rules, the Supreme Court found—unlike previous cases—that the FCC had gone too far.[138] By imposing rules requiring public access channels and prohibiting cable operators from exercising control over content, the FCC had, in effect, imposed "common carrier"[139] obligations on the cable operators.[140] However, as the Court observed, Congress had expressly provided by law that broadcasters were not to be treated as common carriers.[141] The Court reasoned that this prohibition should also extend to operators of cable television systems.[142] In doing so, the Court rejected the FCC's access rules and held that authority to compel public access service must originate from Congress.[143]

Congress eventually tackled public access channels in the Cable Communications Policy Act of 1984.[144] Rather than invest authority to establish and regulate PEG channels in the FCC, Congress authorized state and local governments to condition cable operator franchise grants on provisions for PEG channels.[145] Under the terms of the 1984 Act, cable operators were prohibited from exercising editorial control

135. FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 691–92 (1979), *superseded by statute*, Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), *as recognized in* Manhattan Cmty. Access Corp. v Halleck, 139 S. Ct. 1921, 1926 (2019); *see also* 47 C.F.R. § 76.254(a) (1977), *invalidated by Midwest Video II*, 440 U.S. 689 (1979).

136. *Midwest Video II*, 440 U.S. at 699 n.8 (citing Report and Order in Docket No. 19,988, 49 F.C.C.2d 1090, 1105–06 (1974)).

137. *Id.* at 693–94 (citing 47 C.F.R. § 76.256(b), (d) (1977)). Specifically, cable operators were required to adopt rules prohibiting public access channel users from presenting lottery information, commercial advertising, and obscene or indecent content. *Id.* at 693 & n.4 (citing 47 C.F.R. § 76.256(d) (1977)).

138. *See id.* at 708.

139. As the Court explained, "[a] common-carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .'" *Id.* at 701 (alteration in original) (quoting Report and Order, Industrial Radiolocation Service, Docket No. 16,106, 5 F.C.C.2d 197, 202 (1966)).

140. *Id.* at 701–02.

141. *Id.* at 704 (quoting Columbia Broad. Sys., Inc v. Democratic Nat'l Comm., 412 U.S. 94, 108–09 (1973)); *see also* Communications Act of 1934, Pub. L. No. 73-416, § 3(h), 48 Stat. 1064, 1066 (1934) (codified as amended at 47 U.S.C. § 153(11)).

142. *Midwest Video II*, 440 U.S. at 708.

143. *Id.* at 709.

144. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 789 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 611, 98 Stat. 2779, 2782 (codified as amended at 47 U.S.C. § 531).

145. *Denver Area*, 518 U.S. at 789–90 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing Cable Communications Policy Act § 611).

over PEG channel content.[146] In enacting this legislation, Congress characterized public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."[147]

In 1992, Congress acted further to enable cable operators to restrict "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct" from appearing on PEG channels.[148] This provision was challenged by a group of public access content creators and viewers in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[149] In a highly fractured decision—containing six separate opinions and majority agreement with only a narrow portion of Justice Breyer's plurality opinion—the Court overturned the 1992 Act insofar as it permitted cable operators to censor obscene material on PEG channels.[150] In this decision, the justices described public access channels as "part of the consideration an operator gives [the government] in return for permission . . . to use public rights-of-way";[151] creations of "contracts forged between cable operators and local cable franchising authorities";[152] and "designated public for[a] of unlimited character."[153] However, the Court did not reach a consensus on whether a public access channel is, in fact, a constitutional public forum.[154] Significantly, Justice Kennedy observed that a public forum—which would be subject to First Amendment protections—is neither limited to "physical gathering places" nor to "property owned by the government."[155] However, Justice Kennedy's separate opinion was joined only by Justice Ginsberg.[156] The Court concluded only that permitting cable operators to restrict obscene material on PEG channels violated the First Amendment as "not appropriately tailored" to meet the "legitimate objective of protecting children."[157]

146. Cable Communications Policy Act § 611(e).

147. *Denver Area*, 518 U.S. at 791 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting H.R. REP. NO. 98-934, at 30 (1984)).

148. *Id.* at 735 (plurality opinion) (quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486, *invalidated by Denver Area*, 518 U.S. 727 (1996)).

149. *Id.* at 790 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

150. *Id.* at 768 (plurality opinion).

151. *Id.* at 734.

152. *Id.* at 772 (Stevens, J., concurring).

153. *Id.* at 791 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

154. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1937 (2019) (Sotomayor, J., dissenting).

155. *Denver Area*, 518 U.S. at 792 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (first citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995); and then citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

156. *Id.* at 780. Justice Stevens also wrote approvingly of Justice Kennedy's analysis generally, but he did not believe it was necessary to categorically describe public access channels as public fora. *Id.* at 768 (Stevens, J., concurring).

157. *Id.* at 733 (plurality opinion).

III. THE COURT'S REASONING

In *Manhattan Community Access Corp. v. Halleck*,[158] the Supreme Court addressed the question of whether MNN, a public access channel operator, is subject to the freedom of speech protections of the First Amendment.[159] Justice Kavanaugh's majority opinion held that MNN is a private actor, not a state actor.[160] As a result, MNN cannot be liable for infringing on the respondents' First Amendment rights.[161]

The Court first assessed whether MNN could be a state actor under the exclusive public function test.[162] The Court emphasized that under this test, the function must be both "traditionally" and "exclusively" one performed by the government.[163] Stressing that "very few" functions meet that test, the Court identified two clear examples that satisfy the test: "running elections and operating a company town."[164] However, the majority was quick to elaborate many functions that have been ruled out as traditional, exclusive public functions: "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity."[165] The Court considered whether operating public access channels on a cable television system was a traditional, exclusive function performed by the government.[166] Noting that Manhattan already had a history of other private entities that operated public access channels before MNN was formed, the Court summarily determined that operating a public access channel is not a traditional, exclusive governmental function.[167]

The Court next assessed the respondents' argument that the function in question is, more broadly, the operation of a "public forum for speech."[168] The Court rejected this argument by predicating the finding of a public forum on first finding state action.[169] The Court observed that when a forum for speech is provided by the government, such as on sidewalks, in streets and parks, or in a private theater

158. 139 S. Ct. 1921 (2019).
159. *Id.* at 1926.
160. *Id.*
161. *Id.*
162. *Id.* at 1928–29.
163. *Id.* at 1929.
164. *Id.* (quoting Flagg Bros., Inc., v. Brooks, 436 U.S. 149, 158 (1978)).
165. *Id.*
166. *Id.*
167. *Id.* at 1929–30.
168. *Id.* at 1930.
169. *Id.*

leased to a city, the forum is a public one.[170] In contrast, where the forum is provided by a private actor, such as a grocery store bulletin board or a comedy club open mic night, the forum is subject to control by the private actor, without regard for First Amendment protections.[171] The Court centered its public forum analysis on the holding in *Hudgens v. NLRB*.[172] In *Hudgens*, the Court held that union employees did not have a First Amendment right to advertise a strike on the private property of a shopping center.[173] Justice Kavanaugh's majority opinion in *Halleck* summarized that merely providing a forum for speech does not transform a private actor into a state actor.[174] In a footnote, the Court rejected the argument that private property dedicated to public use, as suggested in a prior case, might be sufficient grounds for finding state action.[175] In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, the Court observed in dicta that "a speaker must seek access to public property or to *private property dedicated to public use* to evoke First Amendment concerns . . . ."[176] However, the Court in *Halleck* rejected the proposition that private property can be subjected to First Amendment protections when the private owner opens that property as a venue for public speech.[177]

The Court further addressed the argument for state action through the relationship between MNN and the City of New York.[178] The Court likened the City's designation of MNN as operator of the public access channels to a license, contract, or state-sanctioned monopoly.[179] Observing the wide range of precedents holding state regulation insufficient to support a finding of state action, the Court rejected the argument that MNN's designation from the City could form the basis for finding state action.[180] The Court specifically compared MNN to the electric utility in *Jackson* to bolster its finding that mere regulation of MNN cannot make MNN a state actor.[181] Rather, the Court observed that the regulations imposed on MNN make it more closely resemble a common carrier, not a state actor.[182]

170. *Id.*

171. *Id.*

172. *Id.* at 1930–31 (discussing Hudgens v. NLRB, 424 U.S. 507, 517–21 (1976)).

173. *Hudgens*, 424 U.S. at 520–21.

174. *Halleck*, 139 S. Ct. at 1930.

175. *Id.* at 1931 n.3 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985)).

176. *Cornelius*, 473 U.S. at 801 (1985) (emphasis added).

177. *Halleck*, 139 S. Ct. at 1931 n.3. This is the same argument supported by Justice Kennedy in *Denver Area*. *See supra* notes 155–57 and accompanying text; *see also* Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

178. *Halleck*, 139 S. Ct. at 1931.

179. *Id.*

180. *Id.* at 1931–32

181. *Id.* at 1932 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974)).

182. *Id.*

Finally, the Court addressed whether the public access channels in question were property of New York City, rather than being property of the cable system operator or MNN.[183] Under that theory, MNN might be a state actor as agent for the City in managing its property.[184] The Court observed that the cable operator owns the cable network that contains the channels and that MNN operates those channels using its own facilities and equipment.[185] The cable operator's franchise agreements made no assignment of leases, easements, or other property interests in the public access channels to the City.[186] The Court noted that the franchise agreements merely granted the City the right to designate a private entity as operator of the channels.[187] The Court also rejected the idea that the cable operator's use of public rights-of-way could provide a path to finding state action, observing that the electric utility in *Jackson* likewise used public rights-of-way for its operation.[188] The Court conceded only that if the City had actually operated the public access channels itself, there would be state action in its operation of the channels.[189]

In her dissent, Justice Sotomayor contended that the Manhattan public access channels should be properly viewed as a public forum and that the City created an agency relationship with MNN for their administration.[190] Justice Sotomayor argued that the City obtained a property interest in the public access channels when it concluded the franchise agreements with the cable operator.[191] As a result, Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, would have held that MNN was subject to First Amendment limitations.[192]

In assessing whether the public access channels were governmental property, Justice Sotomayor observed that state regulations required the City to obtain public access channels in the franchise agreement with the cable operator.[193] Noting that the City thereby obtained an "exclusive right to use these channels," Justice Sotomayor found that the City did have a property interest in the channels, "akin at the very least to an easement."[194] Justice Sotomayor found that in the fractured opinions in *Denver Area*, five Justices had made the same comparison between the

183. *Id.* at 1933.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 1933–34.
189. *Id.* at 1934.
190. *Id.* (Sotomayor, J., dissenting).
191. *Id.*
192. *Id.*
193. *Id.* at 1935 (citing N.Y. COMP. CODES R. & REGS. tit. 16, §§ 895.1(f), 895.4(b)(1) (2016)).
194. *Id.* at 1937.

governmental right to public access channels and a public easement.[195] The right to control programming on the public access channels, argued Justice Sotomayor, is just as much a property right as if the City had leased advertising space on a billboard.[196] Because that public forum was opened by the City deliberately for the purpose of hosting speech, Justice Sotomayor would have held that the public access channels are a constitutional public forum.[197]

Having determined the channels to be a public forum, Justice Sotomayor next argued that the City should not be able to avoid its constitutional obligations by contracting out their administration to a private entity.[198] This argument followed from the Court's holding in *West v. Atkins*,[199] in which the Court held that a private doctor contracted by the state to provide medical care in state prisons is a state actor.[200] Were this not the case, the government could avoid any constitutional obligation it wanted by merely contracting out the performance of government functions.[201] Likewise, the City of New York made a "choice that triggers constitutional obligations" and thereafter contracted that obligation to a private entity.[202] As a result, that private entity—MNN—should be deemed to be a state actor for constitutional purposes.[203]

Justice Sotomayor next addressed the majority's reliance on *Jackson* as controlling the outcome of this case.[204] Justice Sotomayor summarized the holding of Jackson and its progeny as a rejection of state action where a private entity enters the marketplace and is "highly regulated" by the state.[205] In contrast, Justice Sotomayor assessed MNN not as a "private entity that simply ventured into the marketplace" but rather as having been "deputized" by the City to administer its public forum.[206] "To say that MNN is nothing more than a private organization regulated by the government is like saying that a waiter at a restaurant is an independent food seller who just happens to be highly regulated by the restaurant's owners."[207]

195. *Id.* (first citing Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 760–61 (1996) (plurality opinion); and then citing Denver Area, 518 U.S. at 793–94 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

196. *Id.* at 1938.

197. *Id.* at 1939.

198. *Id.* at 1939–40.

199. 487 U.S. 42 (1988).

200. *Halleck*, 139 S. Ct. at 1940 (Sotomayor, J., dissenting) (citing West v. Atkins, 487 U.S. 42, 54 (1988)).

201. *Id.* (citing *West*, 487 U.S. at 56 n.14).

202. *Id.*

203. *Id.* at 1941.

204. *Id.* at 1942.

205. *Id.*

206. *Id.* at 1942–43.

207. *Id.* at 1943.

Justice Sotomayor also addressed the Court's relegation of *West v. Atkins* to a footnote.[208] The majority opinion dismissed the relevance of *West* by observing that, unlike providing medical care to inmates, there is no constitutional obligation for the government to operate public access channels.[209] To the contrary, Justice Sotomayor found that once the City had opened a public forum by obtaining the public access channels from the cable operator, the requirement to operate the channels in accordance with the First Amendment followed.[210] Justice Sotomayor rejected the majority's comparison of MNN to a private comedy club.[211] Rather, Justice Sotomayor compared the situation to a state college that, having tired of running its own annual comedy showcase of student performers, hired a local nonprofit to run the show in its place.[212] Justice Sotomayor would not permit the state college to evade its First Amendment obligations merely by contracting out its activities.[213] Neither would she, under that logic, allow the City of New York to escape its constitutional duties by contracting out the management of its public access channels to MNN.[214]

IV. Analysis

The Court in *Halleck* erred in finding that the public access channels were not a public forum.[215] First, Halleck and Meléndez alleged adequate facts to show that the City of New York had created a public forum, over which MNN was designated its agent.[216] Additional facts that could have been brought out had the case not been resolved by motion to dismiss would have borne out this theory further.[217] Further, the Court brushed aside prior decisions supporting the conclusion that a municipal franchisor had a property interest in public access channels sufficient to justify concluding that such channels are a constitutional public forum.[218] Even if the City hadn't created a constitutional public forum under MNN's jurisdiction, the Court still should have found sufficient entwinement between the City of New York and MNN under the line of cases following *Burton*.[219]

208. *Id.*
209. *Id.* (citing *id.* at 1929 n.1 (majority opinion)).
210. *Id.*
211. *Id.* at 1944; *see supra* note 171 and accompanying text.
212. *Halleck*, 139 S. Ct. at 1944 (Sotomayor, J., dissenting).
213. *Id.*
214. *Id.* at 1945.
215. *See infra* Part IV.A.
216. *Halleck*, 139 S. Ct. at 1942 (Sotomayor, J., dissenting).
217. *See infra* notes 226–29 and accompanying text.
218. *See infra* Part IV.A.
219. *See infra* Part IV.B.

A. Public Access Channels Are Properly Viewed as Public Forum

Justice Sotomayor, in her dissent, correctly argued that the public access channels managed by MNN are a public forum.[220] The majority insisted that the City of New York had no "formal easement or other property interest" in the public access channels managed by MNN.[221] However, as Justice Sotomayor pointed out, this case was being heard on appeal from a motion to dismiss.[222] Halleck and Meléndez need not prove their case to survive a motion to dismiss: at the pleading stage, their "factual allegations must be accepted as true."[223] Justice Sotomayor believed that Halleck and Meléndez had alleged adequate facts in their complaint to raise at least a factual question as to the property rights held by the City in the public access channels.[224] To resolve any lingering doubt about the sufficiency of proof of the producers' claims, the Court could have remanded the case for further development of the record.[225]

If the Court had remanded the case for further facts to be developed, the respondents might have demonstrated that MNN had dedicated at least some of its facilities, including the El Barrio Firehouse production facility, to "City Purpose[s]" in a City Purpose Covenant filed in the New York real property records.[226] In MNN's Declaration of Restrictive Covenant, MNN recited that the City had provided funding for its Community Media Center.[227] In exchange for the funding, MNN recorded a covenant that the El Barrio Firehouse premises would be used for 25 years for the benefit of the City, either as a community media center, for ancillary purposes related to running the media center, or for activities approved by the Mayor of the City of New York.[228] Although the covenant does not cover the public access channels themselves, it does cover the MNN facility where the challenged actions took place.[229] Further, it substantiates the idea—the absence of

220. *See infra* notes 221–49 and accompanying text.

221. *Halleck*, 139 S. Ct. at 1933 (quoting Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 828 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part)).

222. *Id.* at 1942 (Sotomayor, J., dissenting).

223. *Id.* at 1935.

224. *Id.* at 1942.

225. *Id.*

226. Manhattan Cmty. Access Corp., *Declaration of Restrictive Covenant*, CITY OF NEW YORK, 1–2 (Sept. 14, 2009), https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2010020100299001.

227. *Id.* at 1.

228. *Id.* at 2.

229. *Id.* at 1 (describing the covered premises as "175 East 104th Street, New York, New York"); *see MNN El Barrio Firehouse Community Media Center*, MANHATTAN NEIGHBORHOOD NETWORK, https://www.mnn.org/firehouse (last visited Aug. 22, 2021) (providing the address of the El Barrio Firehouse facility as "175 E 104th Street, New York, NY 10029").

which was so significant to the majority[230]—that MNN formally granted at least some meaningful property interest in its facilities to the City of New York.[231]

Even without the formal covenant, the various opinions in *Denver Area* demonstrate the Court's understanding that public access channels, as established under franchise agreements, are subject to some property interest held by the franchising government.[232] Justice Breyer, joined by Justices Stevens and Souter, observed that public access channels are reserved "*as part of the consideration* [cable operators] give municipalities" in exchange for the award of a franchise.[233] In effect, this reservation operates much as a public easement or public dedication of private property to public use.[234] Justice Kennedy, joined by Justice Ginsburg,[235] went further to find expressly that public access channels meet the definition of a public forum.[236] Justice Kennedy observed that in some cases, formal title to traditionally recognized public fora, like streets and sidewalks, might be held privately but that title is "held in trust for the use of the public."[237] For Justice Kennedy, the lack of a formal easement was irrelevant to finding that the government had sufficient property interest in the public access channels to make them a public forum.[238]

Further, the *Denver Area* Court distinguished significantly between the history and character of leased access channels versus public access channels in reaching its decision.[239] In the same decision where the Court rejected Congress's grant of authority for cable operators to censor indecent content on public access channels under the Cable Television Consumer Protection and Competition Act of 1992,[240] the Court upheld a substantially similar authorization to censor content on leased access channels.[241] The plurality opinion observed that Congress, when it required

230. *Halleck*, 139 S. Ct. at 1933.

231. Manhattan Cmty. Access Corp., *supra* note 226, at 2.

232. *Compare* Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 760–61 (1996) (plurality opinion) ("[T]he 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 . . . ."), *with id.* at 792 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Public access channels are analogous [to private property held in trust for the use of the public]; they are public fora even though they operate over property to which the cable operator holds title.").

233. *Id.* at 760 (plurality opinion) (emphasis added).

234. *Id.* at 760–61.

235. Justice Stevens also noted his endorsement of Justice Kennedy's analysis, but he did "not think it necessary to characterize the public access channels as public fora." *Id.* at 768 (Stevens, J., concurring).

236. *Id.* at 791 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

237. *Id.* at 792 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

238. *Id.* at 793–94.

239. *Id.* at 760 (plurality opinion).

240. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486, *invalidated in part by Denver Area*, 518 U.S. 727 (1996).

241. *Denver Area*, 518 U.S. at 768.

cable operators in the 1984 Cable Act to make a certain number of channels available for commercial programmers to lease, simultaneously withheld the power of cable operators to exercise editorial control over the leased channels.[242] In the provision of the 1992 Act upheld by the *Denver Area* Court, Congress had restored a small portion of the cable operator's preexisting authority to exercise editorial control over channels it leases to others.[243] In contrast, public access channels had not historically been subject to editorial control by cable operators.[244] When Congress purported to give cable operators limited authority to censor content on public access channels, it had tried to create a new censorship right that did not previously exist.[245] This view is inconsistent with a characterization of public access channels as the private property of the cable operator, but it fits well with the view of public access channels as a constitutional public forum.

The characterization of public access channels as a public forum is also squarely within the Congressional purpose in supporting their creation under section 611 of Cable Communications Policy Act of 1984.[246] In its report on the bill, the House Committee on Energy and Commerce declared that the Act serves to "secure[] the First Amendment right of the viewers and listeners to a diversity of information sources . . . ."[247] The report declared that "[p]ublic access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."[248] By enabling local franchising authorities to create public access channels, Congress intended to bestow underrepresented communities with "the opportunity to become sources of information in the electronic marketplace of ideas."[249]

B. MNN is a State Actor by Entwinement with the City of New York

Even if MNN's public access channels cannot be properly characterized as a public forum, the Court still should have found that MNN is a state actor under *Burton* and its progeny because the City of New York had entwined itself with MNN's operations. To this end, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n* is instructive. In *Brentwood Academy*, the Court observed that the Athletic Association had been designated by the State Board of Education to

242. *Id.* at 734 (citing 47 U.S.C. § 532(c)(2)).

243. *Id.* at 743–44, 761.

244. *Id.* at 761.

245. *Id.*

246. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 601, 98 Stat. 2779, 2780 (1984) (codified at 47 U.S.C. § 521).

247. H.R. REP. NO. 98-934, at 36 (1984).

248. *Id.* at 30.

249. *Id.*

supervise interscholastic athletic activities.[250] The Association's primary source of revenue was admission fees, supplemented by membership dues paid by member schools.[251] The Court further noted that the state board of education had the authority to designate an unspecified number of members of the association's governing board, although the state designees were nonvoting members of the board.[252]

Similarly, MNN enjoys its position of control over the public access channels solely by virtue of its designation from the City of New York.[253] The Manhattan borough president selects two of the thirteen *voting* members of MNN's board of directors,[254] in contrast to the Tennessee Board of Education's selection of an unspecified number of *nonvoting* members of the Athletic Association's governing board.[255] MNN receives its funding from grants mandated by the City in the franchise agreement, in addition to direct financial support from the City.[256] MNN provided recorded covenants in favor of the City that its facilities would be used for the City's purposes.[257] As the Court noted in *Brentwood Academy*, the determination of entwinement with the government is heavily dependent on facts and circumstances.[258] Based on these facts, there is ample reason to find that the City of New York had entwined itself with MNN sufficiently to support a finding of state action.

250. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 292 (2001).

251. *Id.* at 299.

252. *Id.* at 292, 301.

253. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1931 (2019).

254. *Id.* at 1935 (Sotomayor, J., dissenting); First Amended Complaint, supra note 9, ¶ 36. In dismissing Halleck's complaint, the District Court applied *Lebron v. National R.R. Passenger Corp.* to show that MNN cannot be a state actor because only two of thirteen members of MNN's board are appointed by the city. Halleck v. City of New York, 224 F. Supp. 3d 238, 243 (S.D.N.Y. 2016), *aff'd in part, rev'd in part sub nom.* Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300 (2d Cir. 2018), *rev'd*, 139 S. Ct. 1921 (2019). In *Lebron*, the Court held that a government-created corporation with a *majority* of board members appointed by the government is a state actor for constitutional purposes. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995). However, the Court did not indicate that a corporation can *only* be a state actor when a majority of its board are appointed by the government. *Compare Lebron*, 513 U.S. at 400 (noting that the government reserved the permanent authority to appoint a majority of board members), *with Brentwood Acad.*, 531 U.S. at 291, 301 (noting that school administrators from any member school, public or private, are eligible to be elected to the governing board and that the State Board of Education had the power to appoint only *nonvoting* members of the Athletic Association's board).

255. See *supra* note 252 and accompanying text.

256. *Halleck*, 139 S. Ct. at 1935 (Sotomayor, J., dissenting); CITY OF NEW YORK, *supra* note 71, § 8.3; Manhattan Cmty. Access Corp., *supra* note 226, at 2.

257. *See supra* notes 226–29 and accompanying text.

258. *Brentwood Acad.*, 531 U.S. at 295–96.

V. Conclusion

In *Manhattan Community Access Corp. v. Halleck*, the Supreme Court held that MNN, a public access channel operator, was not a state actor for First Amendment purposes.[259] However, this view is inconsistent with the Court's prior precedents in which the Court expressed views supporting either a finding that public access channels were a public forum or, at a minimum, that the government had some property interest in public access channels.[260] Even if public access channels generally are not public fora subject to First Amendment protection, under the facts and circumstances of this case, MNN should have been found to be sufficiently entwined with the City of New York as to support a finding of state action.[261]

259. *See supra* Part III.

260. *See supra* Part IV.A.

261. *See supra* Part IV.B.