No. 17-1702

IN THE

Supreme Court of the United States

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

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

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

BRIEF OF INTERNET ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICUS CURIAE*

Internet Association represents roughly forty leading technology companies. Its membership includes a broad range of Internet companies, from travel sites and online marketplaces to social networking services and search engines. Internet Association advances public policy solutions that strengthen and protect Internet freedoms, foster innovation and economic growth, and empower small businesses and the public. It respectfully submits this Brief of *Amicus Curiae* in Support of Neither Party to encourage this Court to limit its decision to the unique facts of this case so that its decision does not unintentionally disrupt the modern, innovative Internet.[1]

[1] In accordance with Supreme Court Rule 37.6, *amicus* certifies that (1) this brief was authored entirely by counsel for *amicus curiae* and not by counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from *amicus curiae*, its members, and its counsel, no other person contributed money to fund preparing or submitting this brief.

I. INTRODUCTION

This case presents an exceedingly narrow question for the Court's consideration: whether a private non-profit corporation, appointed by a government official to oversee a cable television public access channel, qualifies a state actor for First Amendment purposes. On its face, that issue has little to do with Internet Association or its members. As Respondents acknowledge, and as the most cursory examination of the facts at issue makes clear, "social media [and other Internet services are] *nothing like* petitioner MNN" and thus "[t]he decision below . . . does not compel any conclusions about the application of the First Amendment to [such services]." Brief in Opposition ("BIO") at 35 (emphasis added). Petitioners agree that Internet services "are not, and should not be considered, constitutional public fora." Petitioner's Br. at 56.

Nevertheless, *amicus curiae* is concerned that any decision that deems MNN a state actor will be misinterpreted in ways that are highly damaging to the Internet. In particular, Internet Association fears that litigants and lower courts will misread such a decision as a general loosening of the exacting restrictions this Court has historically applied when considering whether a private space, operated by a private company, is subject to constitutional scrutiny.

This fear is not unfounded. In recent years, numerous plaintiffs, some bolstered by overbroad or incorrect interpretations of this Court's decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), have attempted to treat Internet companies as state

actors.[2] Thus, while Internet Association takes no position on the question of whether MNN itself is a state actor, it respectfully asks that the Court be mindful that any decision it issues in this case could have effects far beyond the specific context of public access television channels.

In so doing, this Court should emphasize two principal points to prevent any confusion about the legal rights and responsibilities of Internet companies. *First*, this Court should make clear that private property will be deemed a public forum, and the regulation of private property will be deemed a "public function," only in extraordinary circumstances. This Court rarely, if ever, permits the application of these doctrines to private property. To the extent it has deviated from this rule, this Court has done so only when the private property at issue was operated by the state, subject to considerable state regulation, or had taken on *all* of the attributes of a state or local government. Private property owned by a private entity over which the government exercises no control cannot qualify as a public forum. And the regulation of private property that does not in effect function as a "company town" is not a "public function." Those principles, drawn from years of precedent, should remain the guideposts for any analysis of whether MNN is a state actor under the distinctive circumstances of this case.

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[2] *See e.g.*, *Prager Univ. v. Google LLC*, 2018 WL 1471939, *5 (N.D. Cal. Mar. 26, 2018) ("Plaintiff contends that [YouTube and Google] are state actors under the 'public function' test" and cited *Packingham* in support of this claim).

Second, a private property owner is not converted into a state actor merely because it operates a space where free expression is encouraged to occur. Similarly, a *private* space does not become *public* when it shares certain characteristics of a classic public forum. A public access channel may be, as the Second Circuit held in this case, "the electronic version of the public square." *Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 306 (2d Cir. 2018). And the Internet may be "the modern public square." *Packingham*, 137 S. Ct. at 1737. But those facts alone are insufficient to transform these spaces into public forums for purposes of the First Amendment. Instead, the critical antecedent question is whether the private space is, or has all the attributes of, a public forum. A space that is not owned, leased, controlled, or heavily regulated by the government *cannot* be a public forum under this Court's well-established precedent.

At bottom, Internet Association simply asks that "[i]n considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court . . . proceed with caution." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 806 (2011) (Alito, J., concurring). More than two decades ago, a plurality of this Court warned that it was "not at all clear that the public forum doctrine should be imported wholesale" into a "new and changing area"—then the innovative field of cable television. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 749 (1996). The time appears to have come to resolve the question left open in *Denver Area*, but it has not yet arrived for the Internet.[3] Prudence, and

[3] Indeed, numerous courts have rightly held that Internet companies are *not* state actors. *See, e.g.*, *Prager Univ.*, 2018 WL

this Court's "necessarily fact-bound" approach to determining whether a private entity is a state actor, *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 939 (1982), counsel in favor of a narrow decision limited to the unique facts of this case.

1471939, at *8 (holding that YouTube and Google were not "state actors that must regulate the content on their privately created website in accordance with the strictures of the First Amendment"); *Nyabwa v. FaceBook*, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) ("Because the First Amendment governs only governmental restrictions on speech, Nyabwa has not stated a cause of action against FaceBook."); *Shulman v. Facebook.com*, No. CV 17-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) ("The Court also notes that efforts to apply the First Amendment to Facebook . . . have consistently failed."); *Forbes v. Facebook, Inc.*, No. 16 CV 404 (AMD), 2016 WL 676396, at *2 (E.D.N.Y. Feb. 18, 2016) ("Facebook is a private corporation, and Mr. Forbes does not allege any facts that could support a claim of a 'close nexus' between Facebook and the state, such that Facebook's actions (or inaction) may be fairly attributable to the state."); *Doe v. Cuomo*, No. 10-CV-1534 (TJM/CFH), 2013 WL 1213174, at *9 (N.D.N.Y. Feb. 25, 2013) (holding that Facebook not state actor under joint action test); *Kinderstart.com LLC v. Google, Inc.*, No. C 06- 2057 JF (RS), 2007 WL 831806, at *14 (N.D. Cal. Mar. 16, 2007) (concluding Google was not state actor); *see also, e.g.*, *Green v. America Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) ("AOL is a private, for profit company and is not subject to constitutional free speech guarantees. . . . We are unpersuaded by Green's contentions that AOL is transformed into a state actor because AOL provides a connection to the Internet on which government and taxpayer-funded websites are found, and because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages from non-members of AOL."); *Howard v. America Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (concluding that AOL was not a state actor where plaintiffs had argued that "AOL is a 'quasi-public utility' that 'involv[es] a public trust'").

II. THERE IS AN EXCEEDINGLY HIGH BAR FOR SUBJECTING PRIVATE ACTORS TO CONSTITUTIONAL SCRUTINY

This Court has rarely found that a private entity should be subject to the First Amendment obligations traditionally imposed on governmental actors. Indeed, whether one applies this Court's various state action tests or accepts the Second Circuit's position that the public forum test sheds light on the First Amendment's applicability to MNN's actions, the bar to finding that any private entity's actions are subject to constitutional scrutiny is exceptionally high. This case presents no occasion to deviate from, or diminish, these stringent standards.

A. Public Forum Analysis is Almost Never Appropriate When Applied to Private Property

Public forum analysis typically applies only to spaces that are owned and therefore controlled by the government. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal, Hastings College of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, *in regulating property in its charge*, may place limitations on speech.") (emphasis added); *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 827 (Thomas, J., concurring in judgment in part and dissenting in part) ("The public forum doctrine is a rule governing claims of a right of access to public property and has never been thought to extend beyond property generally understood to belong to the government.") (internal citation and quotation marks omitted);

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 956 (9th Cir. 2011) ("The Supreme Court has never allowed privately owned venues to substitute for public fora."). Indeed, the Court has often drawn a sharp divide between private and public property when analyzing putative public fora. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81 (1992) (dismissing evidence of speech activity that occurred at rail stations and bus stations as "irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership" and concluding that the "practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport") (emphasis in original).

To be sure, this Court has sometimes suggested that private property dedicated to public use may be deemed a public forum. Respondents point to two such cases: *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985) and *Marsh v. Alabama*, 326 U.S. 501 (1946). BIO at 27. But the Court made this suggestion only *in dicta* in *Cornelius*[4]

[4] *See* Petitioner's Br. at 31 ("Respondents have previously argued that dicta in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), extends the public forum analysis to 'private property dedicated to public use.' *Id.* at 801. But *Cornelius only makes this statement in passing, with no elaboration, analysis or discussion*. *See id*. at 801-06.") (emphasis added); *see also Prager Univ.*, 2018 WL 1471939, at *8 ("Although both [*Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, and *Cornelius v. NAACP Legal Defense and Education Fund, Inc*., 473 U.S. 788 (1985)] mentioned that public forums may include 'private property dedicated to public use' . . . both cases addressed whether certain speech restrictions enacted by

and *Marsh* has both been carefully limited to its facts and has long been considered a "public function," rather than a public forum case. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-59 (1978) ("A second line of cases under the public-function doctrine originated with *Marsh v. Alabama* . . . .).

This Court's decision in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), is far more instructive. There, the Court held that a "privately owned . . . theater under long-term lease to the city" was a public forum for First Amendment purposes. *Id*. at 547. In other words, the government may not have owned the property at issue in *Conrad*, but it controlled it under a formal legal arrangement and essentially stepped into the shoes of the private owner for the period of the long-term lease. That holding, rather than *Cornelius*' *dicta*, better demonstrates the kind of role the government must play with respect to a particular private space for it to be transformed into a public forum.

Thus, if this Court determines that public access channels are private property, the Second Circuit's decision can be harmonized with this Court's precedents only if it is understood to fall within a

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the federal government violated the First Amendment. Specifically, *Denver Area* involved a challenge to a federal statute regulating the broadcasting of offensive 'sex-related material on cable television,' 518 U.S. at 732, while *Cornelius* addressed a challenge to an executive order that excluded 'legal defense and political advocacy organizations' from participating in a 'charity drive aimed at federal employees.' 473 U.S. at 790. Therefore, neither case addressed the circumstances in which a private property owner must be treated as a state actor for constitutional purposes.").

narrow category of cases in which private property over which the government exerts a significant degree of ownership or control is deemed a public forum. *See Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 306 (2d Cir. 2018) (holding that because "federal law authorizes setting aside channels for public access," state regulation and the terms of a municipal contract both require the provision of such a channel and "a municipal official has designated a private corporation to run those channels" the channels at issue here are public fora). It should go without saying that this kind of public forum analysis could not and should not extend to private organizations like *amicus curiae*'s members, which retain complete ownership and control over their Internet services.[5] They are, in the words of this Court, "not fora at all." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-79 (1998).

B. "Public Function" Analysis Also Sets a High Standard

This Court has set forth several tests for determining whether a private actor should be treated as a state actor for purposes of the First Amendment. Although the parties do not agree about the appropriate state action test to apply in this case, *compare* Pet. Reply Br. for Writ of Certiorari at 5, *with* BIO at 21-28, they do agree on one thing. Neither party has suggested that this Court should find that

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[5] *See, e.g.*, *Knight First Amendment Institute v. Trump*, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018) ("Twitter is a private (though publicly traded) company that is not government-owned."); *id*. at 567 ("Twitter . . . maintains control over . . . all . . . Twitter accounts").

MNN is a state actor under any standard other than the so-called "public function" test.

"Under the public function test, state action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity." *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 264-65 (2d Cir. 2014) internal quotation marks omitted). Thus, "the relevant question" when applying this test "is not simply whether a private group is serving a 'public function,'" but rather "whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). This test is "difficult to satisfy," *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 390 (10th Cir. 2016), in large part because "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State,'" *Flagg Bros.*, 436 U.S. at 158 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). And this Court has routinely rebuffed litigants' attempts to expand the scope of this doctrine to encompass the "broad principle that all businesses affected with the public interest are state actors." *Jackson*, 419 U.S. at 352 (internal quotation marks omitted). This Court should not deviate from these time-tested principles in this case.

This Court has historically demonstrated a strong aversion to finding that a private entity's administration of its property is a "public function." In *Marsh v. Alabama*, 326 U.S. 501 (1946), for example, the Court held that because a privately-owned

"company town" shared "all the characteristics of any other American town" the First Amendment applied just as it would to a publicly-owned town or city. *Id*. at 505. But subsequent decisions interpreting *Marsh* have made clear that private property can "be treated as though it were public" for purposes of the public function test *only if* "that property has taken on all the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.'" *Flagg Bros.*, 436 U.S. at 159 (quoting *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)). This strict state action analysis does not change if "the public is generally invited to use [the private property at issue] for designated purposes." *Lloyd Corp. v. Tanner*, 407 U.S. 551, at 569 (1972); *see also* Petitioner's Brief at 5, 20. Indeed, as this Court has noted:

> Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that [the private] parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an

> argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would . . . constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments.

Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972)

Public access channels have not "taken on *all* the attributes of a town." *Flagg Bros.*, 436 U.S. at 159 (emphasis added). They provide an important public service and are a vital outlet for free expression. But they do not "assume to some significant degree the functional attributes of public property devoted to public use." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972). Accordingly, this case presents no occasion to expand the kinds of spaces where a private entity's operation of private property is subject to constitutional scrutiny under the "public function" test.

Respondents appear to agree that this case is not an easy fit for the traditional "public function" test. Instead, Respondents seek to collapse the public forum and the "public function" tests by arguing that the "public function" that MNN provides is its management and oversight of a public forum. BIO at 1 ("Petitioners do not seriously dispute that, if New York's public access channels are public forums, petitioners' regulation of them is state action. Indeed, that point is elementary. If a municipality delegates administration of its public sidewalks to a nonprofit

corporation, regulation of those sidewalks is still bound by the First Amendment."); *see also* Petitioner's Br. at 23-24 (explaining that there is no precedent for skipping the state action inquiry prior to evaluating whether property is a public forum). Judge Lohier applied the same analysis in his concurring opinion below. *See Halleck*, 882 F.3d at 308 (arguing that a "private entity's regulation of speech in a public forum is a public function when the State has expressly delegated the regulatory function to that entity") (Lohier, J., concurring). But neither Respondents nor Judge Lohier cite *any* cases from this Court to support their contention that control of a public forum by a private entity, absent considerable government control or oversight, is an exclusive state function for purposes of the "public function" test.[6] This, of course, is not

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[6] Respondents suggest that *Marsh v. Alabama*, 326 U.S. 501 (1946) and *Evans v. Newton*, 382 U.S. 296 (1966) support this claim. BIO at 21. But *Marsh* stands solely for the proposition that private property can "be treated as though it were public" for purposes of the "public function" test only where "that property has taken on all the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.'" *Flagg Bros.*, 436 U.S. at 159 (quoting *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)). And *Evans*, which held that the operation of a privately-owned park was an "exclusively public function," "rests on a finding of ordinary state action under extraordinary circumstances"—namely the fact that transfer of a public park's title to private trustees had "not been shown to have eliminated the actual involvement of the city in [its] daily maintenance and care." *Id*. at 159 n.8; *see also Evans*, 382 U.S. at 301 (explaining that "[s]o far as this record shows, there has been no change in the municipal maintenance and concern over this facility" and that "[i]f the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment"); *Utah Gospel Mission*

surprising, given that public forum analysis is traditionally applied only to determine whether a "*governmental entity*, in regulating property in its charge, may place limitations on speech." *Christian Legal Soc'y*, 561 U.S. at 679 (emphasis added).

In any event, it is essential to recognize that Respondents' and Judge Lohier's novel "public function" test carries with it a critical antecedent question: whether the space at issue is, in fact, a public forum. If, as Respondents argue, "[a]dministering public forums is a public function," then it is first necessary to consider whether the property in question is a public forum. BIO at 21. But as the foregoing discussion of public forum doctrine makes clear, *see supra* at 6-7, the only way to answer this antecedent question is to determine whether a private entity has been delegated ownership or control over government property; whether the government has effectively stepped into the shoes of the private entity under some formal legal arrangement; or

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v. Salt Lake City Corp., 425 F.3d 1249, 1254-56 (10th Cir. 2005) (noting that "*Evans* has since been limited to the unique facts involved"). Indeed, the Court's reliance on the government's continued involvement in the management of the park at issue in *Evans* has led many courts—including this one—to associate it with the "entwinement" state action test, rather than this Court's "public function" precedents. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) (distinguishing between "public function" test and "entwinement" test and associating *Evans* with the latter); *see also Gonzalez-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 248 (1st Cir. 2012) (associating *Evans* with this Court's "entwinement doctrine"); *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 815-16 (7th Cir. 2009) (same).

whether a private entity oversees private property that is so controlled or regulated by the government that it can be deemed a public forum. Nothing about Respondent's or Judge Lohier's proposed "public function" test lowers this already-high bar for whether private property qualifies as a public forum in the first place.

III. THERE ARE SERIOUS ADVERSE CONSEQUENCE TO TREATING INTERNET COMPANIES AS STATE ACTORS

As noted, Internet Association takes no position on whether MNN is a state actor. It does, however, wish to emphasize the profound impact that any determination that Internet companies are state actors would have on these companies. These consequences demonstrate why this Court should be especially careful in crafting any state action ruling in these narrow circumstances.

A. An Unintentionally Broad Ruling That Treats Private Companies as State Actors Would Transform the Modern Internet

Imposing the First Amendment's strictures on private actors like *amicus curiae*'s members would result in a radical transformation in the content and caliber of the services provided by modern Internet companies. While it is impossible to predict the full range of consequences such a radical change would wreak on the Internet, two would be unavoidable.

First, the Internet as we know it will become less attractive, less safe, and less welcoming to the average user. "'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992)). Those "'well-defined and narrowly limited'" areas include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id*. at 468-469 (listing cases and quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Outside of this handful of categories, "[i]t is *rare* that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 818 (2000) (emphasis added).

If deemed to be state actors, Internet companies would, under blackletter First Amendment law, be barred from removing or limiting access to videos that contain nudity,[7] profanity and expletives,[8] hate speech,[9] or depictions of animal cruelty.[10] Attempts to restrict videos that advocate non-imminent violence or other lawless action;[11] "demean[] on the basis of race, ethnicity, gender, religion, age, disability, or any other similar

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[7] *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

[8] *Cohen v. California*, 403 U.S. 15, 18 (1971).

[9] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

[10] *Stevens*, 559 U.S. at 482.

[11] *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

ground,"[12] contain content on matters of public concern that nonetheless "inflict great pain" or emotional distress on others,[13] or constitute cyberbullying[14] would be similarly impermissible. As a result, Internet companies could not enforce their community standards or make their own editorial choices about what content to exclude from their websites to best serve and protect their users.

Second, if this Court were to determine that Internet companies are state actors, it will impose a significant penalty on private actors that make their services available to third parties for the expression and exchange ideas. Social media websites and other Internet businesses did not become "the most important places (in a spatial sense) for the exchange of views" by accident. *Packingham*, 137 S. Ct. at 1735. To be sure, the Internet inherently offers a

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[12] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (opinion of Alito, J.); *see id*. at 1766-67 (opinion of Kennedy, J.) ("The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience . . . .[T]he Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[13] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (finding the following placards, placed at a military service member's funeral, to be protected by the First Amendment: "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Fags Doom Nations," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys").

[14] *New York v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014); *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016).

"relatively unlimited, low-cost capacity for communication of all kinds," and those realities have contributed to the Internet's openness. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). But it is equally crucial that the owners and operators of the leading Internet businesses were—and are—committed to promoting expression in a manner consistent with their terms of service and other community norms. Treating these companies as state actors would, in effect, penalize them precisely because of their prior success in creating vibrant and welcoming online communities. This would create a powerful disincentive for future innovators. Other companies would now think twice before allowing users "to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Packingham*, 137 S. Ct. at 1735-36 (citing *Reno*, 521 U.S. at 870).

Put simply, an Internet where companies are treated as state actors is a very different Internet from the one that exists today. It is an Internet where individual businesses must be *less* responsive to community norms and consumer demands, and where these individual businesses are forced to be *less* safe for children and families. And it is an Internet with *less* of a self-directed commitment to free expression. *Amicus curiae* respectfully submit that this Court should consider these consequences as it crafts its decision in this case.

B. A Determination That Private Internet Companies Are State Actors Would Violate Those Actors' First Amendment Rights

MNN does not exercise editorial control over the public access channel it oversees. *Halleck v. City of NY*, 224 F. Supp. 3d 238, 240 (S.D.N.Y. Dec. 13, 2016) (citing 16 N.Y. Comp. Codes R. & Regs. tit. 16 §§ 895.4(c)(8)-(9), which prohibits "editorial control" except for "measures as may be authorized by Federal or State law to prohibit obscenity or other content unprotected by the First Amendment"). By contrast, the vast majority of Internet companies exercise some meaningful measure of editorial control over their websites. The First Amendment implications of holding that MNN is a state actor are therefore dramatically different from treating Internet companies as state actors.

Courts have routinely held that online services receive First Amendment protection for their

editorial choices.[15] This conclusion ineluctably follows from three well-established constitutional principles that the Supreme Court distilled in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). *First*, "since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley*, 515 U.S. at 573 (internal citations and quotation marks omitted). *Second*, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices." *Id*. at 569. Put differently, the First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication." *Id*. at 570. This Court has, for example, recognized that cable operators engage in protected speech "even when they only select programming originally produced by others," and newspapers receive First Amendment protection for their selection of opinion authors and advertisers in their publications. *Id*. *Third*, these bedrock constitutional protections are not "restricted to the

[15] *E.g.*, *Robinson v. Hunt Cty., Texas*, 2017 WL 7669237, at *3 (N.D. Tex. Dec. 14, 2017) ("Facebook has a right to exercise control over the contents of its platform."); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (Facebook has a "First Amendment right to decide what to publish and what not to publish on its platform"); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017) (owner of a website has a "First Amendment right to distribute and facilitate protected speech"); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) (attempt to hold an Internet service liable for "its editorial judgments . . . cannot be squared with the First Amendment").

press." *Id*. at 574. They are "enjoyed by business corporations generally." *Id*.

Given these straightforward and firmly-established principles, Internet companies have a First Amendment right to make editorial choices on their websites. As a consequence, a decision holding or implying that these organizations are state actors would not only run counter to this Court's state action standards, but also abridge these services' First Amendment rights.

IV. ANY RULING IN THIS CASE SHOULD BE AN EXCEEDINGLY NARROW ONE, INFORMED BY THE LEGAL PRINCIPLES AND PRACTICAL CONSEQUENCES SET FORTH ABOVE

Courts have repeatedly emphasized that determining whether a private entity should be subject to constitutional scrutiny is a "*necessarily* fact-bound inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *see also Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1045 (9th Cir. 2018) (noting that "determining whether a location is properly categorized as a public forum involves largely factual questions"). And the facts here are clear. The Cable Communications Policy Act of 1984 "authorizes cable franchising authorities to require for franchise renewal 'that channel capacity be designated for public, educational, or governmental use.'" *Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 302 (2d Cir. 2018) (quoting 47 U.S.C. § 531(b)). New York, in turn, "requires that every franchisee of [certain] cable television station[s] . . . shall designate . . . at least one full-time activated channel for public

access use." *Halleck v. City of NY*, 224 F. Supp. 3d 238, 240 (S.D.N.Y. 2016) (quoting N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(b)(1)). This public access channel must be made available to the public "on a first-come, first-served, nondiscriminatory basis." *Ibid*. (quoting N.Y. Comp. Codes R. & Regs. tit 16, § 895.4(a)(1)). As a condition of Time Warner's cable franchise with New York City, MNN was appointed by the Manhattan Borough President to administer its public access channels. *Ibid*. And MNN is prohibited from exercising any editorial control over this channel, with the exception of taking measures to "prohibit obscenity or other content unprotected by the First Amendment." *Ibid*. (quoting N.Y. Comp. Codes R. & Regs. tit 16, §§ 895.4(c)(8)-(9)).

These features were central to the decision below. As the Second Circuit explained:

> where, as here, federal law authorizes setting aside channels for public access to be "the electronic marketplace of ideas," state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums . . . [and because MNN employees] are not interlopers in a public forum . . . [and instead] are exercising precisely the authority to administer such a forum conferred on them by a senior municipal

> official [the First Amendment applies to their actions]

Halleck, 882 F.3d at 306-307.

Critically, Respondents agree that this case turns on these highly specific facts. It argues that MNN is subject to constitutional scrutiny because (1) New York's public access channels are available to the public on a first-come, first-served basis and are intended to create a forum for expressive activity; (2) MNN cannot assert editorial control over the content displayed on these channels; and (3) New York City created the channels at issue. *See* BIO at 23-25 ("This conduct *taken together*, evinces New York City's unmistakable intent to designate its public access channels as public forums.") (emphasis added). The court below and the parties in this case are therefore in accord that if this Court holds that MNN is a state actor, the unique set of facts at issue here warrants a correspondingly limited holding.

This regulatory structure presents a vivid contrast to Internet companies' role in building and managing their online services. Neither federal nor state law has mandated the creation of any of Internet Association's members—or, for that matter, any relevant private online service. These companies are privately-owned, and the government does not play a comparable role in their oversight or regulation. Unlike MNN, moreover, these companies can control both the users who are permitted to access their sites, as well as the community standards that users must adhere to. Consequently, Internet Association merely asks the Court to make clear that any holding regarding public access channels *cannot* apply to

Internet services, and any finding of state action in this case sheds *no* light on whether Internet companies are subject to constitutional scrutiny. *See* BIO at 35 ("[S]ocial media [and other internet services are] nothing like petitioner MNN."). *But see* Petitioner's Br. at 57 ("[I]f MNN's minimal nexus to the government is sufficient to find state action, then entities such as . . . Facebook [and] Twitter . . . —all of which are subject to some level of governmental regulation—should be concerned."). In so doing, the Court should reaffirm its commitment to the view that, absent extraordinary governmental involvement in the control of a private space or a private entity's assumption of all of the functions of a municipality, neither the public forum nor "public function" doctrines extend to private property operated by a private entity.

V. CONCLUSION

For the foregoing reasons, this Court should carefully limit its opinion to the unique facts of this case and make clear that a private entity's operation of private property will only rarely be subject to constitutional scrutiny.

Respectfully submitted,

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