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

JOINT APPENDIX

PAUL W. HUGHES
Counsel of Record for Respondents
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

MICHAEL B. DE LEEUW
Counsel of Record for Petitioners
TAMAR S. WISE
STUART A. SHORENSTEIN
JESSE R. LOFFLER
COZEN O'CONNOR
45 Broadway, 16th Floor
New York, New York 10006
(212) 509-9400
mdeleeuw@cozen.com

PETITION FOR CERTIORARI FILED JUNE 21, 2018
CERTIORARI GRANTED OCTOBER 12, 2018

285043

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF APPENDICES

The following decision(s), opinion(s) and order(s) have been omitted in printing this Joint Appendix because they appear in the appendix of the Petition for a Writ of Certiorari on the following pages:

Table of Appendices

Page

APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, NO. 16-4155

Date Filed	#	Docket Text
12/14/2016	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Deedee Halleck and Jesus Papoleto Melendez, FILED. [1928906] [16-4155] [Entered: 12/15/2016 02:06 PM]
		***
12/14/2016	3	DISTRICT COURT OPINION, dated 12/13/2016, RECEIVED.[1928910] [16-4155] [Entered: 12/15/2016 02:08 PM]
12/14/2016	4	DISTRICT COURT JUDGMENT, dated 12/14/2016, RECEIVED. [1928913] [16-4155] [Entered: 12/15/2016 02:08 PM]
12/14/2016	5	ELECTRONIC INDEX, in lieu of record, FILED.[1928915] [16-4155] [Entered: 12/15/2016 02:09 PM]
		***

Appendix A

2/2/2017	37	BRIEF, on behalf of Appellant Deedee Halleck and Jesus Papoleto Melendez, FILED. Service date 02/02/2017 by CM/ECF.[1960753] [16-4155] [Entered: 02/02/2017 03:32 PM]
2/2/2017	38	APPENDIX, volume 1 of 1, (pp. 1-160), on behalf of Appellant Deedee Halleck and Jesus Papoleto Melendez, FILED. Service date 02/02/2017 by CM/ECF.[1960768] [16-4155] [Entered: 02/02/2017 03:39 PM]

***

3/9/2017	46	BRIEF, on behalf of Appellee City of New York, FILED. Service date 03/09/2017 by CM/ECF. [1986263] [16-4155] [Entered: 03/09/2017 04:33 PM]
3/9/2017	47	BRIEF, on behalf of Appellee Manhattan Community Access Corporation, Daniel Coughlin, Jeanette Santiago, Cory Bryce and Iris Morales, FILED. Service date 03/09/2017 by CM/ECF. [1986327] [16-4155] [Entered: 03/09/2017 05:00 PM]

***

Appendix A

3/23/2017	57	REPLY BRIEF, on behalf of Appellant Deedee Halleck and Jesus Papoleto Melendez, FILED. Service date 03/23/2017 by CM/ECF. [1996166] [16-4155] [Entered: 03/23/2017 01:08 PM]

***

6/19/2017	71	CASE, before JON, DJ, RJL, C.JJ. , HEARD.[2060979] [16-4155] [Entered: 06/19/2017 12:27 PM]
2/9/2018	85	OPINION, affirming as to the City of New York and reversing as to Manhattan Community Access Corporation and its employees, by JON, DJ, RJL, FILED.[2232824] [16-4155] [Entered: 02/09/2018 09:47 AM]
2/9/2018	86	OPINION, Concurring, by judge RJL, FILED.[2232831] [16-4155] [Entered: 02/09/2018 09:50 AM]
2/9/2018	87	OPINION, Concurring & Dissenting, by judge DJ, FILED.[2232834] [16-4155] [Entered: 02/09/2018 09:51 AM]
2/9/2018	89	CERTIFIED ORDER, dated 02/09/2018, to SDNY (NEW YORK CITY), ISSUED.[2232851] [16-4155] [Entered: 02/09/2018 09:59 AM]

Appendix A

2/9/2018	92	JUDGMENT, FILED.[2233289] [16-4155] [Entered: 02/09/2018 12:40 PM]
		***
2/23/2018	96	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellee Manhattan Community Access Corporation, Daniel Coughlin, Jeanette Santiago and Cory Bryce, FILED. Service date 02/23/2018 by CM/ECF.[2242890] [16-4155] [Entered: 02/23/2018 03:22 PM]
		***
3/23/2018	102	ORDER, petition for rehearing/ rehearing en banc denied, FILED. [2263446] [16-4155] [Entered: 03/23/2018 01:06 PM]
		***
4/13/2018	106	CERTIFIED ORDER, dated 03/26/2018, to SDNY (NEW YORK CITY), ISSUED.[2278481] [16-4155] [Entered: 04/13/2018 09:55 AM]
6/26/2018	107	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 06/25/2018, U.S. Supreme Court docket # 17-1702, RECEIVED.[2332829] [16-4155] [Entered: 06/26/2018 03:10 PM]

Appendix A

10/15/2018	108	U.S. SUPREME COURT NOTICE, dated 10/12/2018, U.S. Supreme Court docket # 17-1702, stating the petition for writ of certiorari is granted, RECEIVED.[2410328] [16-4155] [Entered: 10/15/2018 03:11 PM]

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE) CIVIL DOCKET FOR CASE #: 1:15-CV-08141-NRB

Date Filed	#	Docket Text
10/15/2015	1	COMPLAINT against Cory Bryce, Daniel Coughlin, Manhattan Community Access Corporation, Iris Morales, Jeanette Santiago, The City Of New York,. (Filing Fee $ 400.00, Receipt Number 0208-11512597) Document filed by Deedee Halleck, Jesus Papoleto Melendez.(Perry, Robert) (Entered: 10/15/2015)
		***
12/28/2015	28	LETTER MOTION for Conference *Pre-Motion Conference* addressed to Judge William H. Pauley, III from Michael de Leeuw dated December 28, 2015. Document filed by Cory Bryce, Daniel Coughlin, Manhattan Community Access Corporation, Iris Morales, Jeanette Santiago.(Wise, Tamar) (Entered: 12/28/2015)

12/28/2015	29	LETTER MOTION for Conference *Pre-Motion Conference* addressed to Judge William H. Pauley, III from Emily K. Stitelman, Esq. dated December 28, 2015. Document filed by City of New York.(Stitelman, Emily) (Entered: 12/28/2015)

***

1/4/2016	32	LETTER addressed to Judge William H. Pauley, III from Robert T. Perry dated 01/04/2016 re: Plaintiff's Opposition to Defendants' Letters Requesting Pre-Motion Conferences. Document filed by Deedee Halleck, Jesus Papoleto Melendez.(Perry, Robert) (Entered: 01/04/2016)

***

1/8/2016	34	LETTER addressed to Judge William H. Pauley, III from Robert T. Perry dated 01/08/2016 re: Initial Pre-Trial Conference, Pre-Motion Conference. Document filed by Deedee Halleck, Jesus Papoleto Melendez. (Attachments: # 1 Exhibit Courtesy Copy of Complaint)(Perry, Robert) (Entered: 01/08/2016)

***

2/1/2016	37	SCHEDULING ORDER striking 35 Motion to Intervene. The parties having appeared for a conference on January 28, 2016, the following schedule is established: 1. Plaintiffs may file an amended complaint by February 19, 2016; 2. Defendants' motion to dismiss is due by March 18, 2016; 3. Plaintiffs' opposition is due by April 18, 2016; 4. Defendants' reply is due by April 28, 2016; and 5. Oral Argument is scheduled for May 13, 2016 at 12:00 p.m. This Court also notes that it received a Motion to Intervene on January 27, 2016 (ECF No. 35), which it docketed in advance of the Initial Pretrial Conference for the benefit of the parties. However, because that motion is not properly before this Court, and does not appear to be in compliance with Fed. R. Civ. Pro. 24, the Clerk of Court is directed to strike that motion. The February 19, 2016 conference scheduled during the Initial Pretrial Conference is hereby cancelled. Any pro se litigants wishing to intervene in this case should contact the Pro Se Intake Unit of the Southern District of New York by telephone at (212) 805-0175, or by mail. (Signed by Judge William H. Pauley, III on 2/1/2016) (mro) Modified on 2/1/2016 (mro). (Entered: 02/01/2016)

Appendix A

***

2/19/2016	39	FIRST AMENDED COMPLAINT amending 1 Complaint, against Cory Bryce, City of New York, Daniel Coughlin, Manhattan Community Access Corporation, Jeanette Santiago with JURY DEMAND. Document filed by Jesus Papoleto Melendez, Deedee Halleck. Related document: 1 Complaint, filed by Jesus Papoleto Melendez, Deedee Halleck. (Perry, Robert) (Entered: 02/19/2016)
3/18/2016	40	JOINT MOTION to Dismiss *the Amended Complaint with Prejudice.* Document filed by Cory Bryce, City of New York, Daniel Coughlin, Manhattan Community Access Corporation, Jeanette Santiago. (Wise, Tamar) (Entered: 03/18/2016)
3/18/2016	41	JOINT MEMORANDUM OF LAW in Support re: 40 JOINT MOTION to Dismiss *the Amended Complaint with Prejudice.* . Document filed by Cory Bryce, City of New York, Daniel Coughlin, Manhattan Community Access Corporation, Jeanette Santiago. (Wise, Tamar) (Entered: 03/18/2016)

Appendix A

***

4/18/2016	43	MEMORANDUM OF LAW in Opposition re: 40 JOINT MOTION to Dismiss *the Amended Complaint with Prejudice.* . Document filed by Deedee Halleck, Jesus Papoleto Melendez. (Perry, Robert) (Entered: 04/18/2016)
4/28/2016	44	REPLY MEMORANDUM OF LAW in Support re: 40 JOINT MOTION to Dismiss *the Amended Complaint with Prejudice.* . Document filed by Cory Bryce, City of New York, Daniel Coughlin, Manhattan Community Access Corporation, Jeanette Santiago. (Wise, Tamar) (Entered: 04/28/2016)

***

5/16/2016	49	LETTER addressed to Judge William H. Pauley, III from Robert T. Perry dated 05/16/2016 re: The Court's Invitation to Address Defendants' New Argument Made in Oral Argument on Their Motions to Dismiss. Document filed by Deedee Halleck, Jesus Papoleto Melendez.(Perry, Robert) (Entered: 05/16/2016)
5/16/2016	50	LETTER addressed to Judge William H. Pauley, III from Tamar S. Wise

		of Cozen O'Connor dated 5/16/16 re: Response to Plaintiff's Letter 49 Letter addressed to Judge William H. Pauley, III. Document filed by Cory Bryce, Daniel Coughlin, Manhattan Community Access Corporation, Iris Morales.(Wise, Tamar) (Entered: 05/16/2016)
		***
8/23/2016	59	TRANSCRIPT of Proceedings re: conference held on 1/28/2016 before Judge William H. Pauley, III. Court Reporter/Transcriber: Karen Gorlaski, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/16/2016. Redacted Transcript Deadline set for 9/26/2016. Release of Transcript Restriction set for 11/25/2016.(McGuirk, Kelly) (Entered: 08/23/2016)
		***
12/13/2016	62	OPINION & ORDER re: 40 JOINT MOTION to Dismiss *the Amended*

Appendix A

		Complaint with Prejudice, filed by Manhattan Community Access Corporation, Jeanette Santiago, Daniel Coughlin, Cory Bryce, City of New York. Defendants' motion to dismiss is granted. The Clerk of Court is directed to terminate any pending motions and mark this case as closed. (Signed by Judge William H. Pauley, III on 12/13/2016) (cla) Modified on 1/23/2017 (cla). (Entered: 12/13/2016)
		***
12/14/2016	63	CLERK'S JUDGMENT: It is, ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion & Order dated December 13, 2016, Defendants' motion to dismiss is granted; accordingly, the case is closed. (Signed by Clerk of Court Ruby Krajick on 12/14/2016) (Attachments: # 1 Right to Appeal, # 2 Right to Appeal)(km) (Entered: 12/14/2016)
		***
12/14/2016	65	CORRECTED NOTICE OF APPEAL re: 64 Notice of Appeal, 63 Clerk's Judgment, 62 Memorandum & Opinion,. Document filed by Deedee

		Halleck, Jesus Papoleto Melendez. (Perry, Robert) (Entered: 12/14/2016)
		***
1/4/2017	66	TRANSCRIPT of Proceedings re: argument held on 5/12/2016 before Judge William H. Pauley, III. Court Reporter/Transcriber: Martha Martin, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/25/2017. Redacted Transcript Deadline set for 2/6/2017. Release of Transcript Restriction set for 4/4/2017.(Siwik, Christine) (Entered: 01/04/2017)
		***
2/9/2018	69	OPINION of USCA (Certified) as to 65 Corrected Notice of Appeal filed by Jesus Papoleto Melendez, Deedee Halleck. USCA Case Number 16-4155. Appeal from the December 14, 2016, judgment of the District Court for the Southern District of New York, (William H. Pauley III, District

Judge), dismissing for failure to state a valid claim allegations of First Amendment violations against the City of New York and a private corporation and its employees operating a public access television channel. *See Halleck v. City of New York*, 224 F. Supp. 3d 238 (S.D.N.Y. 2016). The Plaintiffs-Appellants contend that a public access channel is a public forum. Affirmed as to the City of New York, reversed as to Manhattan Community Access Corporation and its employees, and remanded. Judge Lohier concurs with a separate opinion; Judge Jacobs concurs in part and dissents in part with a separate opinion. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 02/09/2018. (nd) (Entered: 02/09/2018)

***

3/30/2018	71	MANDATE of USCA (Certified Copy) as to 65 Corrected Notice of Appeal, filed by Jesus Papoleto Melendez, Deedee Halleck. USCA Case Number 16-4155. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED as to the City of New York and REVERSED as to Manhattan

Appendix A

Community Access Corporation and its employees. The case is REMANDED for further proceedings consistent with this Court's opinion. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 03/30/2018. (Attachments: # 1 Opinion, # 2 Concurring Opinion, # 3 Concurring and Dissenting Opinion) (nd) (Entered: 03/30/2018)

****

APPENDIX B — FIRST AMENDED COMPLAINT, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 19, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ECF Case
15 Civ. 8141 (WHP)

DEEDEE HALLECK and JESUS PAPOLETO MELENDEZ,

Plaintiffs,

-against-

THE CITY OF NEW YORK; MANHATTAN COMMUNITY ACCESS CORPORATION; DANIEL COUGHLIN; JEANETTE SANTIAGO; and CORY BRYCE,

Defendants.

FIRST AMENDED COMPLAINT

Jury Trial Demanded

Plaintiffs DEEDEE HALLECK and JESUS PAPOLETO MELENDEZ, by their attorney, Robert T. Perry, respectfully allege as follows:

Appendix B

NATURE OF ACTION

1. Plaintiffs brings this action for preliminary and permanent injunctive relief, compensatory damages, punitive damages, and attorney's fees pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988 for violation of their civil rights under 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. Plaintiffs also assert supplemental claims under New York law.

2. The City of New York ("the City") has created an electronic public forum--the cable public access channels in Manhattan -- delegating control of that forum to the Manhattan Community Access Corporation, commonly known as Manhattan Neighborhood Network ("MNN"), an entity largely funded by the City through cable television franchise fees and whose board of directors includes City employees. Exercising its delegated authority, MNN has barred plaintiff Melendez from all MNN services and facilities and censored plaintiff Halleck's programming, all because MNN officials disagree with plaintiffs' viewpoints critical of MNN's administration and management of the cable public access channels in Manhattan, in violation of plaintiffs' rights to freedom of speech under the First Amendment and Article 1, Section 8 of the New York State Constitution. MNN has further prevented members of the general public, including plaintiffs, from attending and videotaping regular meetings of MNN's board of directors, in violation of the New York Open Meetings Law.

Appendix B

JURISDICTION AND VENUE

3. This action is brought pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, and the First Amendment to the United States Constitution.

4. The Court has jurisdiction over plaintiffs' federal law claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

5. The Court has jurisdiction over plaintiffs' supplemental state law claims under 28 U.S.C. § 1367.

6. Venue is proper in the Southern District of New York under 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to plaintiffs' claims occurred in this district.

JURY DEMAND

7. Plaintiffs demand trial by jury of all issues properly triable thereby pursuant to Fed. R. Civ. P. 38(b).

PARTIES

8. Plaintiff DEEDEE HALLECK is a resident of the City, County, and State of New York.

9. Plaintiff JESUS PAPOLETO MELENDEZ is a resident of the City, County, and State of New York.

10. Defendant THE CITY OF NEW YORK ("the City") is, and was at all times relevant herein, a municipal

corporation duly organized and existing under the laws of the State of New York.

11. Defendant MANHATTAN COMMUNITY ACCESS CORPORATION, commonly known as Manhattan Neighborhood Network ("MNN"), is a not-for-profit corporation organized under the laws of the State of New York.

12. Defendant DANIEL COUGHLIN is and was MNN's Executive Director at all relevant times herein. Defendant Coughlin is being sued in his individual capacity.

13. Defendant JEANNETTE SANTIAGO is and was MNN's Programming Director at all relevant times herein. Defendant Santiago is being sued in her individual capacity,

14. Defendant CORY BRYCE is and was MNN's Manager of Production & Facilitation at all relevant times herein. Defendant Bryce is being sued in his individual capacity.

STATEMENT OF FACTS

Cable Public Access Channels

15. Cable operators use cable or optical fibers strung above ground or buried in ducts to reach the homes and businesses of their subscribers.

16. Because the construction of this physical infrastructure entails the use of public rights-of-way and often results in significant disruption of streets, alleys, and other public property, cable operators must obtain franchises from local governments.

17. Almost all cable franchise agreements require cable operators -- as a condition for easements to use the public rights-of-way -- to dedicate some channels for programming by the public ("cable public access channels") -- channels which "are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in,* 1984 U.S.C.C.A.N. 4655,4667.

18. Cable public access channels serve as a conduit for "groups and individuals who generally have not had access to the electronic media ... to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in,* 1984 U.S.C.C.A.N. 4655, 4667.

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

20. Almost from the inception of cable public access channels, cable operators have been barred from exercising editorial discretion over such channels.

21. In most communities, there is a single cable operator that provides service in a given geographical area.

22. To ensure that cable operators, even absent competition from other cable operators in the same geographical area, provide "the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), Congress enacted the Cable Communications Policy Act of 1984, Public Law No. 98-549, 98 Stat. 2780 (1984) ("the 1984 Cable Act"), which included provisions relating to cable public access channels.

23. The 1984 Cable Act ratified the pre-existing authority of local governments to require that cable operators, as a condition of cable franchise approval, provide cable public access channels. *See* 47 U.S.C. 531(a).

24. The 1984 Cable Act also prohibits cable operators generally from exercising any editorial control over any constitutionally protected expression appearing on cable public access channels. 47 U.S.C. § 531(e).

25. In regulating cable franchising by local governments in the State of New York, the New York State Public Service Commission ("PSC") has adopted certain minimum standards for cable public access channels, which the PSC defines as "channel[s] designated for noncommercial use by the public on a first-come, first-served, nondiscriminatory basis." 16 N.Y.C.R.R. 895.4(a).

26. The PSC's regulations provide that every cable television franchisee with a channel capacity of 36 or more channels shall designate at least one full-time activated channel for public access use. 16 N.Y.C.R.R. 895.4(b).

27. The PSC's regulations also provide that a municipality may designate an entity other than the cable operator to operate and administer the cable public access channels in that community. 16 N.Y.C.R.R. 895.4(c)(1).

28. The PSC's regulations further provide that the designated entity shall schedule channel time on the cable public access channels "on a first-come, first-served, nondiscriminatory basis." 16 N.Y.C.R.R. 895.4(c)(4).

29. The PSC's regulations further provide that neither the cable operator nor the municipality may exercise editorial control over cable public access channels except that a cable operator may take such measures as may be authorized by federal or state law to prohibit obscenity or other content unprotected by the First Amendment. 16 N.Y.C.R.R. 895.4(c)(8)-(9).

30. The City has awarded cable franchises in Northern and Southern Manhattan to Time Warner Entertainment Company, L.P. ("Time Warner").

31. Section 8.1.1 of the respective franchise agreements requires Time Warner to set aside certain cable channels for public access programming.

32. Section 8.1.8 of the respective franchise agreements provides that the cable public access channels in Manhattan shall fall under the jurisdiction of an "independent, not-for-profit, membership corporation" -- a Community Access Organization or CAO -- designated by the Manhattan Borough President.

Appendix B

33. Section 3.3.01 of the Grant and Use Agreement by and between Time Warner and the CAO annexed to the respective franchise agreements provides that: "The CAO shall maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law."

34. The Manhattan Borough President has designated the Manhattan Community Access Corporation -- commonly known as Manhattan Neighborhood Network ("MNN") -- to oversee the cable public access channels in Manhattan.

35. Incorporated in 1991, MNN is funded by the City from franchise fees collected not only from Time Warner but also from Verizon and RCN Corporation, which now are also franchised by the City to provide cable television service in Manhattan.

36. MNN's Board of Directors ("the MNN Board") is comprised of up to 13 members, two of whom are to be selected by the Manhattan Borough President and work fulltime in the latter's office.

37. In *Manhattan Neighborhood Network Policies,* MNN describes "Our Mission" as follows:

> MNN is responsible for administering public access cable TV services in Manhattan. Our purpose is to ensure the ability of Manhattan residents to exercise their First Amendment rights through moving image media to create

> opportunities for communication, education, artistic expression and other noncommercial uses of video facilities on an open and equitable basis.
>
> In providing services, we seek to involve the diverse racial, ethnic and geographic communities of Manhattan in the electronic communication of their varied interest, needs, concerns and identities.

Manhattan Neighborhood Network Policies, *available at* http://www.mnn.org/policies (updated May 2015).

38. While MNN's principal offices and studio are at 553 West 59th Street in Manhattan, MNN opened the MNN El Barrio Firehouse Community Media Center ("the El Barrio Firehouse")-- on property once occupied by a real firehouse and leased by MNN from the City for nominal rent -- in East Harlem in early 2012.

Plaintiffs' Suspension From Manhattan's Cable Public Access Channels

39. Plaintiff Halleck has been involved in cable public access programming in Manhattan since the 1970's, not only as a producer but also as an advocate of such programming.

40. Plaintiff Melendez has been involved in cable public access programming in Manhattan since the mid-1990's, principally through assisting youth and senior citizens at the University Settlement in East Harlem in producing such programming.

41. On the evening of December 14, 2011, plaintiff Halleck, Kym Clark, Carlos Pareja, and Betty Yu came to the El Barrio Firehouse to speak at the regular quarterly meeting of the MNN Board, which was being held that evening at the Firehouse.

42. Plaintiff Halleck, Ms. Clark, Mr. Pareja, and Ms. Yu sought to urge the MNN Board to reinstate a community media grant program and a youth program which had recently been discontinued.

43. Upon learning that plaintiff Halleck, Ms. Clark, Mr. Pareja, and Ms. Yu were present, defendant Coughlin approached them and said that the MNN Board meeting was closed.

44. When plaintiff Halleck observed that MNN's by-laws required all regular MNN Board meetings to be open to the public, defendant Coughlin told her that the by-laws had been changed, which was not true.

45. In early January 2012, plaintiff Melendez accepted an invitation from Iris Morales, MNN's new Director of the El Barrio Firehouse, to join MNN's Community Leadership Program.

46. The Community Leadership Program was ostensibly designed to provide individuals of artistic merit and community commitment with training in field and studio production.

47. Those invited to participate in the Community Leadership Program, including plaintiff Melendez, were

to meet for training sessions on Wednesday evening for 10 consecutive weeks.

48. On February 28, 2012, plaintiff Halleck e-mailed Norris Chumley, a member of the MNN Board, requesting that she, plaintiff Melendez, and Kym Clark be allowed to attend and speak at the regular quarterly meeting of the MNN Board in March 2012.

49. On March 10, 2012, defendant Coughlin replied to plaintiff Halleck by e-mail, inviting plaintiffs Halleck and Melendez and Ms. Clark to attend the regular quarterly meeting of the MNN Board at the El Barrio Firehouse on Wednesday evening, March 14, 2012.

50. On Wednesday evening, March 14, 2012, at about 7:00 p.m., the MNN Board held a regular quarterly meeting at the El Barrio Firehouse.

51. Pursuant to the invitation extended by defendant Coughlin (*see* ¶ 49 *supra*), plaintiffs Halleck and Melendez and Ms. Clark attended the regular quarterly meeting of the MNN Board on Wednesday evening, March 14, 2012.

52. Plaintiff Halleck brought a video camera to videotape the meeting.

53. The Community Leadership Program also held its weekly training session that evening, Wednesday, March 14, 2012, at the El Barrio Firehouse.

54. Plaintiff Melendez initially went to the training session but stepped out to attend the meeting of the MNN Board downstairs.

55. As soon as plaintiff Halleck began videotaping, the MNN Board, at defendant Coughlin's direction or with his approval, abruptly ended the meeting and adjourned.

56. Plaintiff Melendez then returned to the training session upstairs.

57. Shortly thereafter, Ms. Morales came into the training session and told plaintiff Melendez that she wanted to speak with him.

58. Plaintiff Melendez followed Ms. Morales out of the El Barrio Firehouse.

59. On the sidewalk outside the El Barrio Firehouse, Ms. Morales screamed at plaintiff Melendez, calling him "a traitor."

60. By the time that Ms. Morales finished her tirade, the training session was over.

61. Plaintiff Melendez went back inside the El Barrio Firehouse, picked up his belongings, and left.

62. The following Wednesday evening, March 21, 2012, plaintiff arrived at the El Barrio Firehouse to attend the Community Leadership Program's weekly training session only to learn that he was barred from participation.

63. The next day, Thursday, March 22, 2012, plaintiff Melendez called Ms. Morales for a clarification of his

status in the Community Leadership Program and was told to come to the El Barrio Firehouse to meet with Ms. Morales the following day.

64. On Friday afternoon, March 23, 2012, plaintiff Melendez met with Ms. Morales in a studio at the El Barrio Firehouse.

65. Ms. Morales screamed at plaintiff Melendez, threw crumpled papers at him, and at one point struck him, though not with great force.

66. Using strong language but without raising his voice, plaintiff Melendez told Ms. Morales that she was acting inappropriately.

67. Hearing Ms. Morales's screams, an MNN security guard entered the office.

68. Plaintiff Melendez got up and left the El Barrio Firehouse.

69. By letter dated April 12, 2012, defendant Coughlin informed plaintiff Melendez that Ms. Morales had withdrawn her invitation to him to participate in the Community Leadership Program "due to conduct incompatible with the program's team-building and open communications values."

70. Defendant Coughlin stated -- falsely -- that "your confrontational, disrespectful and loud behavior on March 23 necessitated an intervention from MNN staff alarmed about Ms. Morales's safety."

71. On information and belief, Ms. Morales withdrew the invitation to plaintiff Melendez to participate in the Community Leadership Program, at defendant Coughlin's direction or with his approval, because plaintiff Melendez had attended the regular quarterly meeting of the MNN Board on Wednesday evening, March 14, 2012 with plaintiff Halleck. (*See* ¶¶ 51-55 *supra*.)

72. Nearly four months later, on July 19, 2012, MNN held an invitation-only formal opening of the El Barrio Firehouse.

73. MNN invited, among others, a select group of public officials, including then Manhattan Borough President Scott Stringer and then City Council Member Melissa Mark-Viverito, to the opening.

74. Even though they were not invited to the opening, plaintiffs stood outside the entrance to the El Barrio Firehouse during the opening, interviewing invitees on videotape as they arrived.

75. When Jose Angel Figueroa, Ms. Morales's boyfriend and a participant in MNN's Community Leadership Program, arrived for the opening, plaintiff Halleck asked him -- politely -- "Would you like to say something about public access?"

76. Mr. Figueroa angrily replied to plaintiff Halleck, "Don't fuck with me."

77. Plaintiff Melendez responded in kind, "Hey fuck you."

78. Mr. Figueroa then rushed towards plaintiff Melendez to assault him.

79. An MNN security guard intervened, grabbing Mr. Figueroa before he could strike plaintiff Melendez.

80. Despite his attempted assault and battery on plaintiff Melendez, Mr. Figueroa was allowed to enter the El Barrio Firehouse to attend the opening.

81. A short while later, plaintiff Melendez stated to plaintiff Halleck as she videotaped him in front of the El Barrio Firehouse:

> You know what's funny. I had to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facility here. Because I am being locked out by people of color. There's irony for you.

82. In late August or early September 2012, plaintiff Halleck submitted two programs to MNN's programming department for airing as "specials" on MNN's cable public access channels, including a program entitled "The 1% Visits the Barrio."

83. Based on the video footage taken by plaintiff Halleck in front of the El Barrio Firehouse on July 19,2012, "The 1% Visits the Barrio" presented plaintiffs' view of MNN as more interested in pleasing "the 1%" than addressing the community programming needs of those living in East Harlem, including plaintiff Melendez, notwithstanding that MNN calls itself the Manhattan *Neighborhood* Network.

84. "The 1% Visits the Barrio" aired on MNN's cable public access channels at 8:30 a.m. on October 2, 2012.

85. By letter dated October 11, 2012 but not mailed until later, defendant Santiago, MNN's Programming Director, informed plaintiff Halleck that she was suspended for three months from airing programs over MNN's cable public access channels.

86. Defendant Santiago stated that "The 1% Visits the Barrio" program airing on October 2, 2012 violated MNN program content restrictions barring "participation in harassment or aggravated threat toward staff and/or other producers."

87. Defendant Santiago asserted, in particular, that plaintiff Melendez's statement in "The 1% Visits the Barrio" program -- that "People of color work in this building and I have to wait until people get fired, they retire or someone kills them so that I can come and have access to the facility here." -- incited violence and harassment towards staff and was in direct violation of MNN's "zero tolerance on harassment."

88. Defendant Santiago's assertion was false, as plaintiff Melendez, in making the above statement in "The 1% Visits the Barrio" program, neither intended to incite violence or harassment towards MNN staff nor did the statement have that effect.

89. Plaintiff Halleck did not receive the letter until October 24, 2012.

90. By letter to defendant Coughlin dated October 25, 2012, plaintiff Halleck appealed the decision to suspend her for three months from airing programs over MNN's cable public access channels.

91. Plaintiff Halleck protested that defendant Santiago, in her October 11, 2012 letter, had selectively quoted plaintiff Melendez's statement in "The 1% Visits the Barrio" program and taken the statement out of context.

92. Plaintiff Halleck pointed out that plaintiff Melendez was merely expressing his despair at being barred from use of a neighborhood facility and denied that the statement incited violence or threatened anyone.

93. Plaintiff Halleck suggested that the real reason for the suspension was because she had questioned the transparency and accountability of MNN's management.

94. By letter to plaintiff Halleck dated November 19, 2012, defendant Coughlin denied plaintiff Halleck's appeal of her three-month suspension from airing programs over MNN's public access channels.

95. Disregarding plaintiff Melendez's full statement in "The 1% Visits the Barrio" program (*see* ¶ 81 *supra*), defendant Coughlin asserted that "[t]he fact remains that the words 'kills them' were used in a direct reference to MNN staff of color that currently manage and/or work at the MNN El Barrio Firehouse."

96. In closing, defendant Coughlin warned plaintiff Halleck that "[f]uture failure to follow MNN policies may result in permanent suspension from accessing MNN facilities and services."

97. On information and belief, defendant Coughlin suspended plaintiff Halleck for three months from airing programs over MNN's cable public access channels because plaintiff Halleck's "The 1% Visits the Barrio" program presented the view that MNN was more interested in pleasing "the 1%" than addressing the community programming needs of those living in East Harlem, including plaintiff Melendez, notwithstanding that MNN calls itself the Manhattan *Neighborhood* Network.

98. On July 6, 2013, plaintiffs Halleck and Melendez met defendant Coughlin by chance at a mutual friend's private party in the Catskills, to which all three had been invited.

99. Plaintiff Melendez politely sought to address his status at MNN with defendant Coughlin.

100. Defendant Coughlin angrily replied that it was not the appropriate time to discuss the matter.

Appendix B

101. Plaintiff Melendez uttered some vulgarities but did not strike or push or threaten defendant Coughlin.

102. The chance encounter lasted about a minute.

103. Realizing that defendant Coughlin's anger precluded a constructive discussion, plaintiff Halleck led plaintiff Melendez away.

104. By letter to plaintiff Melendez dated August 1, 2013, defendant Coughlin suspended plaintiff Melendez from all MNN services and facilities indefinitely.

105. Defendant Coughlin stated-- falsely-- that during the chance encounter on July 6, 2013, plaintiff Melendez said that he wanted to and was going to "fuck me up."

106. Defendant Coughlin also stated -- falsely -- that plaintiff Melendez pushed him over.

107. Defendant Coughlin further stated-- falsely-- that plaintiff Melendez engaged in a disrespectful and loud confrontation with defendant Morales in March 2012, necessitating staff intervention.

108. Defendant Coughlin also stated -- falsely -- that in July 2012 outside the El Barrio Firehouse plaintiff Melendez was involved in a threatening altercation with an invited MNN guest (Jose Angel Figueroa) following an exchange of insults.

109. In closing, defendant Coughlin stated that MNN had "zero-tolerance for harassment or threats of violence of any kind towards MNN staff, producers or users."

110. On information and belief, defendant Coughlin suspended plaintiff Melendez from all MNN services and facilities indefinitely because plaintiff Melendez had attended the regular quarterly meeting of the MNN Board on Wednesday evening, March 14,2012 with plaintiff Halleck (see ¶¶ 50-55 *supra*) and because plaintiff Melendez expressed the view in "The 1% Visits the Barrio" program that MNN was more interested in pleasing "the 1%" than addressing the community programming needs of those living in East Harlem, including plaintiff Melendez, notwithstanding that MNN calls itself the Manhattan *Neighborhood* Network.

111. By letter to plaintiff Halleck dated August 9, 2013, defendant Coughlin suspended plaintiff Halleck for one year effective immediately from all MNN services and facilities.

112. Defendant Coughlin repeated his false assertions about plaintiff Melendez's words and actions during the chance encounter on July 6, 2013. *See* ¶¶ 105-06 *supra.*

113. Defendant Coughlin further asserted that MNN continued to be in receipt of complaints about the public posting on the internet of plaintiff Halleck's "The 1% Visits the Barrio" program on YouTube, though he did not state the nature of the complaints, the number of complaints, or who made the complaints.

114. In closing, defendant Coughlin stated that MNN had "zero-tolerance for harassment or threats of violence of any kind towards MNN staff, producers or users."

115. On information and belief, defendant Coughlin suspended plaintiff Halleck for one year from airing programs over MNN's cable public access channels because plaintiff Halleck's "The 1% Visits the Barrio" presented the view that MNN was more interested in pleasing "the 1%" than addressing the community programming needs of those living in East Harlem, including plaintiff Melendez, notwithstanding that MNN calls itself the Manhattan *Neighborhood* Network.

116. Although plaintiff Halleck's one-year suspension from MNN's services and facilities ended on August 9, 2014, she still cannot air "The 1% Visits the Barrio" program on MNN's cable public access channels or, for that matter, any programming in which plaintiff Melendez appears, since plaintiff Melendez is barred from MNN services and facilities.

117. On April 17, 2015, plaintiff Melendez visited MNN's 59th Street facility to submit a "Project Request Form" for a cable public access program entitled "El Barrio (East Harlem) Community Poet, Jesus Papoleto Melendez Chats with El Barrio's ArtSpace P.S. 109 Residency-Artists."

118. Plaintiff Halleck accompanied plaintiff Melendez, videotaping plaintiff Melendez submitting the "Project Request Form" to MNN employees.

119. Defendant Bryce, MNN's Manager of Production & Facilitation, informed plaintiff Melendez during the visit that he was still suspended from all MNN services and facilities indefinitely.

120. MNN security officers escorted plaintiff Melendez from the building.

121. By letter to plaintiff Melendez dated April 24, 2015, defendant Bryce returned plaintiff Melendez's "Project Request Form."

122. Defendant Bryce stated that plaintiff Melendez's indefinite suspension from all MNN services and facilities remained in full force and effect and that plaintiff Melendez was not permitted to access any MNN facility, equipment, or service.

123. Defendant Bryce also stated -- falsely -- that plaintiff Melendez's indefinite suspension was due to plaintiff Melendez's pattern of harassment, threats and violent conduct toward MNN staff and facility users in 2012 and 2013.

124. Defendant Bryce further stated that the videotaping during plaintiff Melendez's April 17, 2015 visit to MNN's 59th Street facility was disrespectful and in direct violation of MNN's Code of Conduct which prohibits "Video, photo or audio recording of any employee, user or guest without their informed consent."

125. Notwithstanding his attempted assault and battery on plaintiff Melendez on July 19, 2012 (*see* ¶¶ 75-80 *supra*), Jose Angel Figueroa continued to have access to MNN services and facilities after that date.

126. The City is aware than MNN has censored plaintiffs' and other cable public access programming, as plaintiff Halleck and other cable public access producers have brought the censorship to the Manhattan Borough President's attention.

127. As result of the foregoing, plaintiffs have suffered emotional distress, mental anguish, embarrassment, humiliation, and violation of their constitutional rights.

128. For plaintiff Halleck, her suspension from airing programs on the Manhattan cable access channels was especially embarrassing and humiliating -- as well as ironic -- since she was an outspoken advocate for the creation and funding of a CAO to administer and manage the cable public access channels in Manhattan in the early 1990's and has spent most of her life advocating and promoting cable access programming not only in New York City but also throughout the United States and abroad.

129. For plaintiff Melendez, his indefinite ban from all MNN services and facilities -- now approaching two-and-one-half years -- was also especially embarrassing and humiliating -- as well as ironic -- given that MNN used videos of plaintiff's classes teaching media skills to East Harlem clients if the University Settlement to lobby the City to support use and remodeling of City property for the El Barrio Firehouse.

130. Plaintiffs have suffered and continue to suffer irreparable harm inasmuch as their free speech rights have been and continue to be denied.

Appendix B

FIRST CLAIM FOR RELIEF

(First Amendment Claim Under 42 U.S.C. § 1983)

131. Plaintiffs repeat and reallege paragraphs "1" through "130" with the same force and effect as if they were fully set forth herein.

132. Required by state regulation and local franchise agreements, the cable public access channels in Manhattan are a designated public forum of unlimited character.

133. The City, through the Manhattan Borough President, has delegated control of that public forum to MNN.

133. Defendants have barred and restricted plaintiffs' access to the above public forum based on viewpoints expressed by plaintiffs in "The 1% Visits the Barrio" program critical of MNN's administration and management of the cable public access channels in Manhattan, in violation of plaintiffs' rights to freedom of speech under the First Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF

(New York State Free Speech Claim)

134. Plaintiffs repeat and reallege paragraphs "1" through "133" with the same force and effect as if they were fully set forth herein.

135. Defendants have barred and restricted plaintiffs' access to the public forum based on viewpoints expressed by plaintiffs in "The 1% Visits the Barrio" program critical of MNN's administration and management of the cable public access channels in Manhattan, in violation of plaintiffs' rights to freedom of speech under Article 1, Section 8 of the New York State Constitution.

THIRD CLAIM FOR RELIEF

(New York Open Meetings Law Claim)

136. Plaintiffs repeat and reallege paragraphs "1" through "135" with the same force and effect as if they were fully set forth herein.

137. Article 7 of the New York Public Officers Law ("the Open Meetings Law") declares, in part, that: "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." N.Y. Public Officers Law Art. 7, § 100.

138. To accomplish that purpose, the Open Meetings Law provides that "[e]very meeting of a public body shall be open to the general public, except that an executive session may be called and business transaction therein in accordance with section one hundred five of this article." N.Y. Public Officers Law Art. 7, § 103(a).

139. A "meeting" is defined as "the official convening of a public body for the purposes of conducting public business ...." N.Y. Public Officers Law Art. 7, § 102(1).

140. A "public body" is defined as "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law ...." N.Y. Public Officers Law Art. 7, § 102(1).

141. A "public corporation" is defined to include a municipality. N.Y. Gen. Mun. Law § 66(1)-(2).

142. As an entity which performs a governmental function for both the State and City of New York -- the administration and management of the cable public access channels in Manhattan -- MNN is a "public body" under the Open Meetings Law and is required to make the regular meetings of its board of directors open to the general public.

143. MNN nonetheless continues to hold regular meetings of its board of directors without permitting the general public to attend and videotape the meetings, in violation of the Open Meetings Law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand the following relief jointly and severally against all the defendants:

Appendix B

(A) A preliminary and permanent injunction restraining defendants from interfering with plaintiffs' exercise of their free speech rights over the cable public access channels in Manhattan;

(B) A preliminary and permanent injunction restraining defendants from violating the Open Meetings Law by barring the general public from attending and videotaping regular meetings of MNN's board of directors;

(C) Compensatory damages in an amount to be determined at trial;

(D) Punitive damages in an amount to be determined at trial;

(E) Reasonable attorney's fees and costs of this litigation; and

(F) Such other relief as this Court deems just and proper.

Dated: Brooklyn, New York
February 19, 2016

Respectfully submitted,

/s/_____
ROBERT T. PERRY (RF-1199)
45 Main Street, Suite 230
Brooklyn, New York 11201
(212) 219-9410
Attorney for Plaintiffs

Appendix B

TO: Emily K. Stitelman (via ECF)
Assistant Corporation Counsel
Administrative Law Division
New York City Department of Law
100 Church Street
New York, New York 10007
Counsel for Defendant, The City of New York

Tamar S. Wise, Esq.
Michael B. de Leeuw, Esq.
Cozen O'Connor
275 Park Avenue
New York, New York 10172
Counsel for Defendants, Manhattan Community Access Corporation, Daniel Coughlin, Jeannette Santiago, and Cory Bryce

APPENDIX C — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 28, 2016, FILED AUGUST 23, 2016

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15 CV 8141 (WHP)

DEEDEE HALLECK, *et al.*,

Plaintiffs,

v.

MANHATTAN COMMUNITY ACCESS CORPORATION, *et al.*,

Defendants.

New York, N.Y.
January 28, 2016
10:20 a.m.

Before:

HON. WILLIAM H. PAULEY III
District Judge

[2](In open court; case called)

MR. PERRY: Robert Perry for plaintiffs Deedee Halleck and Jesus Papoleto Melendez. Good morning, your Honor.

Appendix C

THE COURT: Good morning, Mr. Perry.

MS. STITELMAN: Emily Stitelman assistant corporation counsel for the city.

THE COURT: Good morning, Ms. Stitelman.

MS. WISE: Good morning, your Honor. Tamar Wise for Manhattan Community Access Corporation, Daniel Coughlin, Iris Morales, Jeanette Santiago and Cory Bryce.

MR. DE LEEUW: Michael de Leeuw from Cozen O'Connor for the same defendants.

THE COURT: This is an initial conference in this case and a premotion conference.

Briefly, Mr. Perry, what's the nature of the claim here?

MR. PERRY: Your Honor, this is a First Amendment case.

THE COURT: You can remain seated for this conference but pull your microphone close. Pull it to you. Closer.

MR. PERRY: Closer. There we go. Wonderful. Thank you, your Honor.

This is a First Amendment case, your Honor. The plaintiffs claim violation of their First Amendment rights

and their rights under the state free speech guarantee insofar as [3]Manhattan Neighborhood Network suspended Ms. Halleck from programming for three months and then later for a year and suspended Mr. Melendez indefinitely from its services and facilities and programming because of viewpoints that they expressed in a program called The One Percent Visits the El Bario which aired on Manhattan Neighborhood Network's cable channels, access channels in October 2012.

We maintain, your Honor, that the cable public access channels in Manhattan are an electronic public forum created by state law and franchise agreement by the city of New York; that the city, having created the electronic public forum must apply the rules applicable to public fora, that it can't simply avoid those responsibilities by delegating them to Manhattan Neighborhood Network, and that Manhattan Neighborhood Network is a state actor that must abide by those same rules.

THE COURT: All right. When you say that your clients were suspended for a period of three months and then a year for one of them and then indefinitely for the other, what's the current status of those suspensions?

MR. PERRY: Well, Ms. Halleck's suspension ended -- both of her suspensions have ended. Mr. Melendez's suspension remains in effect.

Shortly before filing the lawsuit he made an application to air on a program and it was rejected because the suspension remains in effect. The suspension has been

in [4]effect since August 2013. And while Ms. Halleck's suspension is not in effect, she can't air the programming -- the program the one percent solution -- One Percent Visits the El Bario on Manhattan Neighborhood Network channels and she can't use Mr. Melendez as a speaker in her programs. So in that respect the suspension continues for her too.

THE COURT: Both groups of defendants have submitted premotion letters. Who wants to be heard?

MS. STITELMAN: Good morning, your Honor.

As the city summarized in their premotion letter, plaintiffs' First Amendment claim against the city fails. In order to succeed on a claim under 42 U.S.C. 1983, the plaintiff must allege that the person or entity charged with the constitutional deprivation is a state actor. Plaintiff cannot prove that here. The complaint makes no allegation that the city or the Manhattan borough president, which is the entity that chose Manhattan Neighborhood Network to administer and operate the public access channels in Manhattan had any involvement with the decision to prevent plaintiffs from airing any content on the public access channels. In fact, neither the city nor the borough president have any editorial control over content aired on the public access channels. This is a point that plaintiffs concede in paragraph 29 of their complaint. Simply because the borough president has a role in selecting the nonprofit to operate and administer the public [5]access channels does not make that entity a state actor.

Appendix C

Your Honor, we would argue that if you find that plaintiffs failed to state a federal claim that the court not exercise supplemental jurisdiction on the state claims. To the extent that your Honor does exercise supplemental jurisdiction on the state claims, the First Amendment claim under the New York state Constitution fails for the same reason the federal First Amendment claim fails. And the open meeting law claims fail as well since the plaintiff makes no allegation that the Manhattan borough president had any involvement with the meetings which are controlled by the MNN, Manhattan Neighborhood Network, bylaws which the city has no role in drafting and does not regulate.

THE COURT: Are you aware whether there's any binding authority regarding whether public access television is a public forum subject to First Amendment protections under these circumstances?

MS. STITELMAN: Your Honor, in two cases which are cited in my letter, *Bernas v. Cable Vision* and *Loce v. Time Warner*. The courts in those cases found that the cable providers, Cable Vision and Time Warner, were not state actors but, moreover, they found that the state or the municipality with no editorial control or involvement in crafting the cable operators' policies. So there was not enough of an intersection for it to be a state action.

[6] THE COURT: All right. Thank you.

What about Manhattan Community Access Corporation?

MS. WISE: Your Honor, we agree with the position taken by the city. We would add that the complaint fails to state that MNN is a state actor.

The Supreme Court has made clear that to be equated with the state for purposes of a Section 1983 claim a plaintiff needs to show that a private actor acts as the government and that's demonstrated by showing that the government has the authority to appoint at least the majority of the entity's board.

In this case, plaintiff concedes that MNN's board is mostly comprised of members who are not designated by the city. In fact, the borough president only has authority to appoint 2 of up to 19 members of the board.

And the plaintiff also here fails to meet any of the tests set forth by the Second Circuit for holding a private entity responsible for -- sorry -- holding the private entity accountable as a state actor. There are no facts in the complaint that show that the state compelled any actions by MNN. There are no facts in the complaint showing that the state participated with MNN in denying plaintiff the opportunity to present this video. And there are no facts in the complaint showing that provision of public access television is a function that is exclusively vested in the [7]state.

Your Honor, plaintiff makes the argument in his papers that the Supreme Court has held that public access television is a public forum. And that's not correct. That is a misreading of the court's decision in *Denver Area*.

And, in fact, the majority specifically held that it was not going to decide whether public access television was a public forum.

THE COURT: All right. Both sets of defendants want to make motions. Some of the arguments that you're going to be raising are the same arguments, are they not?

MS. STITELMAN: Yes, your Honor.

THE COURT: So what about filing one consolidated motion to dismiss?

MS. WISE: We can do that, your Honor.

THE COURT: All right. Mr. Perry, I've reviewed your letter in opposition. You see what the arguments are that the defendants intend to advance. Do you wish to amend your complaint to endeavor to meet the arguments that they propose to offer to dismiss the complaint?

MR. PERRY: Your Honor, I think the complaint adequately states the facts I need to state to make my arguments except in one respect. I'm going back and forth on it. That is with regard to Ms. Morales. And we're contemplating -- I have to speak further with my clients about it but we're contemplating dismissing the complaint claims [8]against Ms. Morales. But other than that I believe -- I litigated the *Denver Area* case to the Supreme Court. It's now nearly 20 years ago. And I've read it again. Justice Kennedy and Justice Ginsberg agreed that cable public access channels were designated public fora.

I put in my letter that the plurality left that issue open, but it left the issue open. And Justice Thomas disagreed. But that's all set forth in my letter. I think there is a very decent argument that cable public access channels are public fora.

THE COURT: The point of my question is simply that before we go through this motion to dismiss if you wanted to do something to bolster your pleading to meet their arguments I'm prepared to let you do it.

MR. PERRY: Your Honor, I would -- I'm sorry to interrupt.

THE COURT: Because this is just -- it's not going to be a learning exercise. Having defendants lay out the arguments they want to advance, having discussed it as a conference, and recognizing that you've got the opportunity to replead on those, to address those arguments now. I'm not going to give you leave to replead if I wind up dismissing the complaint on the very same arguments that the defendants have raised in their letter -- in their premotion letter briefs. That's all.

[9]MR. PERRY: I understand, your Honor. I appreciate that. I would like to avail myself of your invitation to --

THE COURT: How much time would you like? Then I'll tee up a motion.

MR. PERRY: Would two weeks --

THE COURT: Whatever you'd like.

MR. PERRY: Two weeks, your Honor.

THE COURT: So, why don't you go ahead then and file -- file an amended complaint by February 11.

MR. PERRY: Actually could I ask for three weeks?

THE COURT: Sure. February 19.

MR. PERRY: Thank you.

THE COURT: Now, assuming that the defendants want to proceed with a motion addressed to the amended complaint, when do you want to file your motion?

MS. WISE: Thirty days, your Honor.

THE COURT: All right. You'll file your motions on March 18. Make it one consolidated motion.

MS. WISE: Yes, your Honor.

THE COURT: How much time would you like, Mr. Perry, to oppose the motion?

MR. PERRY: Thirty days, your Honor.

THE COURT: Sure. April 18.

Any reply by April 28.

I will set the matter down for an oral argument on [10]May -- Friday, May 13 at 12 noon.

I take it -- are the parties in agreement that until the boards are cleared with respect to this motion that it's appropriate for discovery to be stayed?

MS. STITELMAN: Yes, your Honor.

MR. PERRY: Yes, your Honor.

THE COURT: All right. Now, last night I received a letter from a *pro se* Paula Gloria Tsaconas Barton who purported to submit a motion to intervene. I caused it to be docketed on ECF only so that you would be aware of it in advance of this conference. Have you had an opportunity to review it?

MR. PERRY: I noticed it last night about 7 p.m., your Honor. I read it over quickly. I spoke with one of my -- one of the plaintiffs. But beyond that -- I've looked at it. I'm not sure it makes out the requirements for a motion or for intervention as of right. But at this point I'm still thinking about it and speaking with my clients about it.

THE COURT: What do the defendants have to say? Ms. Stitelman.

MS. STITELMAN: Yes, your Honor. I reviewed the letter last night when it came in. It does not appear to comply with Rule 24(c) which requires that motions to intervene be accompanied by a pleading and would also

request that it be set down for a premotion conference to the extent your Honor wants to review the motion.

[11]MS. WISE: We're in agreement, your Honor.

THE COURT: All right. I will set the matter down. You can respond to the proposed intervenor's letter. And we'll take it up on February 19 at 3 o'clock.

Anything further?

MR. PERRY: Nothing from plaintiff, your Honor.

THE COURT: Anything further from the defendants.

MS. STITELMAN: No, your Honor.

MS. WISE: No, your Honor.

THE COURT: All right. I'll see you next month.

UNIDENTIFIED MALE SPEAKER: Your Honor --

THE COURT: Excuse me. No. Have a seat. You're not a party. This is not a school board meeting. You can't just come down here and think you can shout out in my courtroom.

(Adjourned)

APPENDIX D — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED MAY 12, 2016, FILED JANUARY 4, 2017

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15 CV 8141 (WHP)

DEEDEE HALLECK,
JESUS PAPOLETO MELENDEZ,

Plaintiffs,

v.

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, IRIS MORALES, JEANETTE SANTIAGO, CORY BRYCE, CITY OF NEW YORK,

Defendants.

ARGUMENT

New York, N.Y.
May 12, 2016
3:40 p.m.

Before: HON. WILLIAM H. PAULEY III, District Judge

***

Appendix D

[2](Case called)

THE COURT: This is oral argument on the defendants' motion to dismiss.

First, as a housekeeping matter, this Court has received a number of pro se motions to intervene and to compel discovery and, I guess, just a few moments ago to disqualify the Court. Discovery has been stayed pending resolution of this motion. The motions to intervene are being held in abeyance until the motion to dismiss is resolved, as is the motion to disqualify.

This Court will not accept any filings made by email or mail directly to chambers. Any pro se litigants must make their submissions through the pro se office. Several individuals have been burdening my chambers with innumerable phone calls with questions seeking advice and everything else. No more phone calls. I'm instructing my clerks not to speak to any of you. I've had it, plain and simple. It disrupts the ordinary course of litigation and how cases are supposed to proceed.

This case is proceeding today on the argument on the motions to dismiss with the parties who are before it.

So with that, who wishes to be heard on behalf of the defendants?

MS. WISE: Your Honor, Tamar Wise for the MNN defendants.

[3]THE COURT: All right. Take the podium.

MS. WISE: Good afternoon, your Honor.

Plaintiffs bring constitutional claims and claims under the New York Open Meetings Law against MNN. But MNN is indisputably a private actor. It receives no city funds; it owns its own property; it appoints the vast majority of its board with independent directors; and it has no contractual relationship with the city. And under circumstances like this, courts are clear that there must be a predicate finding of state action.

THE COURT: But, look, you reject out of hand the plaintiffs' argument that MNN is liable as a state actor, right, if Manhattan's cable public access channels are a public forum, right?

MS. WISE: Well, your Honor --

THE COURT: Do you reject that argument out of hand?

MS. WISE: Yes, your Honor, we dispute that analysis.

THE COURT: By rejecting it, doesn't that create a problem in which there's no remedy for a free speech violation?

MS. WISE: Well, your Honor, there is a remedy. The PSC, the Public Service Commission regulations are those that govern the creation of MNN and the franchising

of the cable networks. And there's an administrative remedy under the PSC, and that's been utilized before by aggrieved producers to bring their claims to the PSC, and the PSC is a body that's best [4]equipped to deal with situations like this. They are the ones that promulgate the regulations for first come, first serve nondiscriminatory behavior, and that's where claims like this belong, your Honor.

THE COURT: Is MNN's only purpose to administer the public access channels?

MS. WISE: Yes, your Honor, it's an independent nonprofit created for that purpose.

THE COURT: Is it the defendants' position that MNN has unfettered discretion to suspend producers and make editorial judgments regarding content?

MS. WISE: Yes, your Honor. In fact, the statutory scheme and the regulatory scheme at issue here prohibits the city or the cable operator from exercising any editorial discretion. Full discretion lies with MNN.

THE COURT: Does MNN maintain that it would be permitted to suspend plaintiffs solely because they criticized MNN?

MS. WISE: Well, your Honor, that's not MNN's position here.

THE COURT: I'm asking you whether MNN's position would be that they would be permitted to suspend plaintiffs solely because they criticized MNN.

MS. WISE: No, your Honor.

MNN is bound by, number one, the regulations of the [5]PSC, which require nondiscriminatory action on the part of the independent entity that administers these public access channels. Moreover, MNN has its own rules and regulations.

THE COURT: But now I'm confused because a few moments ago you said that MNN had the unfettered discretion to suspend plaintiffs' producers who make editorial judgments regarding their content, didn't you? So which is it?

MS. WISE: It's subject to the PSC regulations.

THE COURT: How do you draw the line?

MS. WISE: Respectfully, your Honor, that's something that the PSC needs to determine. MNN makes the decisions that it understands it as best they can pursuant to those regulations, and any dispute about them belongs before the body that created those regulations.

MNN has its own appeal procedure, internal appeal procedure for its own bylaws and rules and regulations that it itself is allowed to promulgate. And then it answers to the regulations that the PSC creates.

THE COURT: I'm just trying to understand for a moment where MNN thinks the line is. You tell me that MNN would not be permitted to suspend the plaintiffs solely because they criticized MNN, but that MNN has unfettered discretion to suspend producers and make editorial judgments regarding content.

MS. WISE: Well, your Honor, the viewpoint [6]discrimination would fall under the nondiscriminatory regulation imposed by the PSC regulations. So we're not saying that MNN would allow to have -- to exercise viewpoint-based discrimination. That falls under the nondiscriminatory --

THE COURT: Would you pull the microphone a little closer? I'm having a hard time hearing you.

MS. WISE: Is this better?

THE COURT: A lot better.

MS. WISE: Sorry.

As I was saying, your Honor, viewpoint-based discrimination would fall under the nondiscriminatory regulation that the PSC mandates.

THE COURT: What's MNN's official position regarding the reasons why plaintiffs were terminated?

MS. WISE: Your Honor, the reason that the plaintiffs were terminated is set forth in the letter exchanges set forth in the complaint, which is that the plaintiffs had

exhibited hostile and threatening language in a video that certain MNN employees felt was threatening and that was violative of the rules and regulations of MNN. That was the reason that that video was not allowed to be aired.

THE COURT: What was threatening about that video?

MS. WISE: I can read you the words.

And this is from --

THE COURT: I've looked at the video. Better than [7]reading the words, isn't it? What's so threatening about it?

MS. WISE: Well, your Honor, the employees at MNN felt threatened by this. They felt that it threatened their own security; an employer is required to take that seriously. This is a time when threats -- you can't judge whether a threat is empty or not; you can't judge whether words like this have something threatening behind them or not.

THE COURT: So who decides whether something is threatening? If one employee says subjectively they're threatened, would that be a basis on which MNN could terminate somebody's privileges?

MS. WISE: Well, your Honor, at least one of the plaintiffs now is able to use MNN. The video would be allowed to be aired if it were edited to exclude the language that MNN had found offensive.

THE COURT: Did MNN ever inform the plaintiffs of that?

MS. WISE: To my knowledge, yes.

THE COURT: When was that?

MS. WISE: I don't have that information in front of me, your Honor, I wasn't prepared for it for this motion, but I can find out.

THE COURT: People get hyperbolic all the time, don't they? What's really so threatening about that?

MS. WISE: Your Honor, I think it's a judgment that [8]MNN needed to make for its own employees. And that's something that went up on appeal internally at MNN and then it was determined that that should remain.

THE COURT: Let's turn to a slightly different issue.

Which case do you think presents the best analysis explaining why public access channels are not public fora?

MS. WISE: Your Honor, I think it's the *Alliance Community Media* case, the ACM case in the D.C. Circuit from 1995.

In that case, the appellate court considered whether a particular regulation imposed was constitutionally improper to the extent that it gave cable operators the option of banning certain kinds of obscenity on public access television.

In that case, the court went through an analysis of why public access channels were not public fora. The reason it gave was public forum is a government-owned property.

This is not government-owned property; plaintiff concedes that. This is not an argument regarding public property.

Private property has not traditionally been considered a public forum. Plaintiffs have pointed to a certain line of *dictum* from a Supreme Court case in 1985, the *Cornelius* case, where the Court mentioned the idea of private property being designated for public use. That idea has never been applied; certainly not in this Circuit. The Supreme Court has twice [9]called that theory attenuated and said it's a far reach to call that private property a public forum.

Indeed, the only controlling case where that idea has ever been brought to fruition is the *Marsh v. Alabama* case of a company town. That was an extreme case where the private entity assumed all functions of the municipality, and plaintiffs don't allege that here.

THE COURT: What about the plaintiffs' argument that the Supreme Court's decision in *Denver Area* calls into question *ACM*?

MS. WISE: Well, your Honor, the pluralities opinion in *Denver Area* did not address the public forum issue; in fact, it said it was premature to decide whether private property could be turned into a public forum. So it didn't address it at all.

THE COURT: What else do you have for me?

MS. WISE: Well, your Honor, I think the important point to make here is that where a private entity is going to be held liable for a constitutional violation, courts have been clear that the predicate inquiry to make is whether there's state action. In fact, the Second Circuit dealt with this issue as recently as 2007 in the *Bernas* matter. In that case, there was a constitutional claim brought against a public access operator. The court went through the state actor analysis. It decided that the state actor analysis tests were [10]not met and it affirmed the dismissal of the constitutional claim. It did not, as the plaintiffs would have here, go straight to the public forum question and move backward from there. Respectfully, your Honor, that is the binding precedent upon this Court.

THE COURT: But let's assume for a moment -- the city argues that it can't be sued because there's no *Monell* liability. You argue that MNN can't be sued because it's a private entity. Are plaintiffs entirely without recourse then if their content is rejected on the basis of viewpoint discrimination?

MS. WISE: No, your Honor.

They can go to the Public Service Commission and bring an administrative proceeding there, as many aggrieved producers have previously done.

THE COURT: Did they do so here?

MS. WISE: Not that I'm aware.

THE COURT: Anything further?

MS. WISE: Nothing from me, your Honor.

THE COURT: All right.

Does the city wish to be heard?

MS. STITELMAN: Yes, your Honor.

Your Honor, plaintiffs fail to state a First Amendment claim against the city. They have not met their threshold showing that the city did anything to abridge plaintiffs' First [11]Amendment rights. In fact, the city can only be found liable under Section 1983 where the city itself caused the constitutional violations at issue.

Plaintiffs attempt to attach liability to the city in two ways. First --

THE COURT: Can the city insulate itself from liability just by designating control of the public access channels to a private corporation?

MS. STITELMAN: Your Honor, in this case the city had no control over those public access channels in the first place. So the cases that the plaintiff cites where there's an issue of delegation, those are fire departments or doctors at prison hospitals where the delegation is something that the city or the state already has an obligation to provide.

They have an obligation to provide fire protection; they have an obligation to provide medical care.

But here the delegation, all that the city -- the city is explicitly barred from exercising the editorial control. They do not require MNN to restrict or allow programming on their public access channels. They simply state first-come-first-serve nondiscriminatory basis.

If the city had taken some sort of editorial control, I would say yes, that they did act in some way. But that is not what happened here.

The first way in which they try to attach liability to [12]the city is to say that they knew about the constitutional violations or alleged constitutional violations and did nothing. This argument fails. Inaction by a city can only be shown to create a First Amendment violation where that alleged inaction is the functional equivalent of a decision by the city itself to violate plaintiffs' First Amendment rights, and that is not what we have here.

The second way they try to attach liability to the city, as your Honor mentioned, was by stating that the city has delegated control of the public access channels. And again, that argument fails. In fact, the city is not a party to the grant and use agreement between Time Warner and MNN, which sets forth MNN's administration of the public access channels in the city. The city does not fund MNN's operations; MNN's headquarters are not leased or acquired from the city.

The Manhattan borough president --

THE COURT: But the city gave valuable franchises, didn't it, to Time Warner in both northern and southern Manhattan.

MS. STITELMAN: Yes.

THE COURT: And as part of those agreements, those franchise agreements, didn't the city require Time Warner to set aside certain channels for public access?

MS. STITELMAN: Well, the federal government requires that those franchise agreements do set aside public access [13]channels. Furthermore, the city, through the Manhattan borough president, is obligated to designate a community access organization; in this case that is MNN.

But once that happens, the city's involvement with public access television ends completely, in fact, by law, because they are not allowed to have the editorial control, they don't have the agreement between -- the grant and use agreement is between Time Warner and MNN. So once MNN is designated as that community access organization, they then contract with Time Warner and the city does not participate in that at all; it does not draft that agreement; had no say in it.

Your Honor, I think that looking at the case *Jersawitz v. People TV*, which are cited in our papers, this is a case out of the Northern District of Georgia and it is very

similar; so I think it's helpful for municipal liability. In that case, the City of Atlanta and People TV, which is the nonprofit, contracted so that People TV would administer the public access channels in the City of Atlanta.

Again, they were required to administer those channels on a nondiscriminatory basis and comply with all rules and regulations. In that case, the plaintiff sued both the City of Atlanta and People TV and argued that his First Amendment rights were violated when he was banned from People TV's facilities and equipment.

[14]The Court specifically found no municipal liability, holding that there was no evidence that the City of Atlanta itself had taken any action in violation of plaintiff's First Amendment rights or that it had a policy or a custom so as to encourage People TV to violate plaintiff's First Amendment rights. The Court specifically noted that the City of Atlanta required People TV to comply with all laws and operate public access on a nondiscriminatory and reasonable basis.

Your Honor, we argue that *Jersawitz* -- that the same should happen here; that the Court should decline to find municipal liability since there is no allegation here that the city has a policy or custom permitting MNN its employees, its board of directors to violate plaintiffs' First Amendment rights or anyone's free speech rights; and to the contrary, that it requires MNN to comply with all regulations and laws and make public access channels available on a first-come-first-serve nondiscriminatory basis.

THE COURT: Does the city share MNN's view expressed here at oral argument that the appropriate forum for resolution of these issues is the PSC?

MS. WISE: Yes, your Honor.

THE COURT: Which case do you think presents the best analysis explaining why public access channels are not public fora?

MS. STITELMAN: Your Honor, I would agree with MNN [15]that it's the *ACM* case; however, it's the city's position that the public forum, whether it is public or not public, has no effect on city liability in this case.

THE COURT: All right.

Anything further, Ms. Stitelman?

MS. STITELMAN: I would only add, your Honor, that the plaintiffs have withdrawn their claim for monetary damages. The only relief that plaintiffs seek are injunctions allowing them to air their content over public access channels and to attend MNN meetings. This is not relief that the city can provide and only MNN can permit that.

THE COURT: All right. Thank you, counsel.

MS. STITELMAN: Thank you, your Honor.

THE COURT: Mr. Perry, do you wish to be heard?

MR. PERRY: Yes, your Honor.

Good afternoon, your Honor.

Plaintiffs have plausibly alleged constitutional violations on the defendants' part.

As to MNN, plaintiffs have plausibly alleged state action on MNN's part because the cable public access channels in Manhattan are public forum and MNN, in administering that forum, in regulating the speech over that forum, is performing a traditional and exclusive state function.

The Public Forum Doctrine is a fundamental First Amendment principle. It derives from Justice Owen Roberts' [16]famous statement in *Hague v. CIO*. And I might add to my papers, your Honor, that I realized, preparing for this argument, that was a concurring opinion; it was a concurring opinion for only Justice Roberts and Justice Black. Justice Stone, I believe, joined in the merits. But it became the majority view for the Supreme Court a number of years later. I think that's relevant because opposing counsel have argued that all we have here is a concurring and dissenting opinion from Justice Stevens.

As to the public forum argument, again, the Supreme Court classifies public forum into two categories: Traditional and designated public forum. It is our position that the cable public access channels in Manhattan are designated public forum. PSC regulations require cable

operators to set aside certain channels for public access, require open nondiscriminatory access, noncommercial programming at no charge and bar editorial control by cable operators and by the city.

Let me just mention right now, this is the first time today -- it's not in their briefs -- that I've heard defendants argue essentially primary jurisdiction that the plaintiffs' remedy is not to file a lawsuit in court, but to go into – go to the PSC. First time I've heard that. I haven't dealt with primary jurisdiction; I would have addressed it if it had been raised in the papers. But I did argue a case in the New York [17]Court of Appeals in 1982, *Capital Telephone v. Paterson Telephone Company*. And the case involved the accommodation between the regulation of a telephone company and the state antitrust law called the Donnelly law. I was an assistant attorney general at the time.

The court, it is my recollection, it's a long time ago, came down with the position that we had advocated; that there was a way for the antitrust lawsuit to go forward. I would be glad to address that primary jurisdiction issue. I don't think it's a bar to this lawsuit here probably for the same reasons that I argued in the *Paterson Telephone Company* case.

THE COURT: I'm going to give you an opportunity to submit a letter memorandum on that primary jurisdiction issue.

MR. PERRY: I'll be glad to, your Honor.

Appendix D

In any event, getting back to my argument, the public service regulations and city franchise agreements require the cable operator, Time Warner, to set aside certain channels for public access for expressive activities.

Using Justice Kennedy's observation in *Denver Area*, which was applicable to all public access channels generally, because these cable access channels in Manhattan are required by government fiat, they are a designated public forum of unlimited character. The mere fact that they are not real property doesn't preclude public forum analysis, because public [18]forum analysis applies to any channel of communications. Also the fact that Time Warner owns the cable systems doesn't preclude public forum analysis.

The Supreme Court said in *Cornelius* in 1985 that public forum analysis can apply to even private property dedicated to public use. Yes, opposing counsel referred to a couple of cases, *Lloyd* and *Tanner* decided in the mid '70s that held that if a shopping center owner, for example, opens up his property to public customers, that, in and of itself, does not establish a public forum for First Amendment purposes.

But in the late '70s, in the *Pruneyard* case, the Supreme Court recognized in upholding a California constitutional provision that required a shopping center owner there to make available the public areas for certain expressive activities. The Supreme Court recognized that California thereby created a public forum. The shopping center owner could still adopt reasonable time, place, and

manner regulations. So *Tanner* and *Lloyd* did not involve a situation where a government fiat had created a public forum on private property.

Let me just mention a few other things.

Opposing counsel also mentioned the *Bernas* case from the Second Circuit. I had read that case. I didn't address it in our brief because they did not cite it in their brief. Moreover, it's a summary order; it's a summary opinion. It has [19]no precedential value. It's not binding on this Court; it has no precedential value because it may not have been -- a lot of time may not have been put into it.

As to the *ACM* case, I address that in our papers. The *ACM* case went up to the Supreme Court. The Supreme Court reversed the divided *en banc* court in *ACM* on the public access channel provision which authorized cable operators to remove indecent or offensive programming. Two justices, Kennedy and Ginsburg, ruled contrary to the *ACM* majority that public access channels were public fora. Justice Breyer, in his plurality opinion, just said it's premature because this was a new medium. It's now 20 years later.

THE COURT: Aside from Justice Kennedy's concurrence in *Denver Area*, which opinion do you think best presents the analysis explaining why public access channels should be considered public fora?

MR. PERRY: I would concede, your Honor, that all of the cases -- there's a, quote/unquote, handful of cases

on each side. And a lot of the cases there's not a heck of a lot of analysis.

I was involved in the first case many years ago through the ACLU, the *Missouri Knights* case in Missouri. And even going back over that, I thought that was a reasoned analysis. The judge there concluded that public access channel -- the Kansas City public access channel was a public [20]forum, citing the *Greenberg* case involving the privately-owned letter box. I still think that case is a very helpful case because, yes, the letter boxes, no question, they are private property. And the Court did rule that that's not -- it's a nonpublic forum. But it's relevant, I submit here, because the Court did apply public forum analysis there. It just simply concluded that although the letter mailboxes were part of the United States mail system and, thus, under government control, even though they weren't a public property, government property, they were nonetheless a nonpublic forum. So I think in that respect that the *Missouri Knights* case is a very helpful case.

But I would concede that there's a handful of cases, district court cases, on one side and district court cases on the other side, and then there's the *ACM* case. But there's not a lot of analysis in a lot of these cases. In all of the cases that the city cites, especially the cases from this Circuit, they involve pro se plaintiffs, Glendora in particular. Although I should add that the Second Circuit allowed me to argue one case on behalf of Glendora many years ago; but she basically was a pro se litigator, an amazing pro se litigator.

In any event, there's not a lot of discussion or analysis in any of those cases; they simply cite *ACM*. And for the reasons I point out in my brief, the *ACM* case is unpersuasive. The majority there was simply flatly wrong that [21]the Supreme Court has limited public forum analysis simply to government property. It applied public forum analysis in *Southeastern Promotions*, in *Southeastern Promotions* and in *Pruneyard* and in *Greenberg* to private property. That's only after the Supreme Court recognized formally the public forum doctrine in the '70s going back to prior cases, including the *Semerol* case, Hague. Justice Roberts begins his famous statement by saying, Wherever the title to streets and parks lie, they are held in trust for the public. The language thus in *Lee*, the *Port Authority* cases is thus *dictum*; it's *dictum* that's contrary to Supreme Court precedent.

Finally, as I pointed out to the Supreme Court in the *Denver Area* case many years ago, public streets, many public streets are privately owned; and yet they are indisputably public forum.

THE COURT: You distinguish the Second Circuit's decision in *Loce v. Time Warner* on the ground that it addressed leased -- and not public access -- channels.

Can you elaborate on that distinction? And I guess what I'm focusing on from the Second Circuit's decision is the following language in which the Circuit said: "The fact that federal law requires a cable operator to maintain leased access channels, and the fact that the cabled

franchise is granted by a local government, are insufficient either singly or in combination to characterize the cable operator's conduct of its [22]business as state action nor does it suffice that cable operators, in their management of leased access channels, are subject to statutory and regulatory limitations."

That's a direct quote from the Second Circuit.

Could you elaborate for me on the distinction between leased and public access channels and why it matters for purposes of distinguishing that case's holding that the cable operator was not a state entity for First Amendment purposes?

MR. PERRY: Well, your Honor, leased access channels are channels that are set aside, that are required by the cable -- first required by the Cable Act of 1984 for the requirement of the cable operator to make channel capacity available to unaffiliated program providers.

One of the problems in the cable industry has to do with just simply the economics of the cable industry. In every community, almost every community, there has always been usually one cable operator having the franchise *de facto* or *de jure*, whatever monopoly, there's a bottleneck, as in antitrust parlance, it's a bottleneck. In order to promote competition, as well as to promote First Amendment values, Congress required the cable operator to set aside certain channel capacity for unaffiliated program providers. It's principally economic regulation, common carrier regulation, as opposed to public forum analysis. It's common carrier regulation.

Appendix D

Common carrier regulation evolved -- actually it goes [23]way back to 15th, 16th century England. It came out of the law of public callings. Certain services, transporting goods for hire between cities on donkeys, for example, or wharves or ferries, ferry boats, and certain professions, because they were deemed essential, either because they were deemed essential services or because they were monopoly or near monopoly characteristics, this law of public callings or *juris publici* evolved in England and it got carried over into America.

So in the 19th century you had the -- and I again address this in the brief because it wasn't raised. In the 19th century you had the Supreme Court recognize the common carrier concept in a steamboat case in 1858, the *Niagara Propellers* case. Common carriage was both economic regulation to ensure that certain businesses that had monopoly control or provided essential services or one or both, provided service fairly; so there's a nondiscrimination requirement, first come, first served, that sort of thing. But it also was invoked to allocate risk. So if you were a common carrier, you had insurer liability. And that was, I think, the substance of the *Niagara Propeller* case in 1858.

And then eventually the Congress passed the Interstate Commerce Act in the late '80s, 1880s, creating a federal common carrier scheme for railroads. That was eventually applied to telephone and telegraph companies in the 1910 Mann-Elkins Act. [24]It was applied to pipeline companies. There was a famous pipeline case in 1914. But then in 1934 it was added to the communication -- when the Communications Act was passed. That's common carrier

regulation, your Honor. It looks a little bit like public forums, but it's really economic regulation. So that's what leased access is about.

I brought a case in -- it's a long time ago, but in the mid '80s against -- it was before Time Warner had the franchise; it was called *Manhattan Cable TV* at the time. And I brought a case on behalf of citizens who wanted movie channels other than HBO. And New York Citizens Committee for Cable TV, which is Manhattan Cable TV. And that involved the leased access provisions. And our argument was principally competition, lack of competition. And that's what *Loce* is, I think, largely about; that's why leased access is different. I would concede there is an overlap there, because leased access does promote not only competition, but it promotes diversity of information, at least according to advocates.

But I submit public access is different.

Unless your Honor has any further questions for me, I'll rest on my briefs.

THE COURT: All right. Thank you very much.

MR. PERRY: Thank you.

MS. WISE: Your Honor?

THE COURT: Yes, Ms. Wise.

[25]MS. WISE: Thank you, your Honor.

Appendix D

First I wanted to note is that plaintiffs don't explain in their papers or in their argument why it is proper for a court to engage in the analysis in the chronologically improper order. Courts find it exceedingly rare to apply the Constitution to public entities. And so that's why the state actor analysis should happen before the public forum analysis and not backwards.

In fact, all the cases that plaintiffs cite in which a public access channel was found to be a public forum, in those cases it was first found to be a state actor. And in that case, the relationship between the public access operator and the state was very, very close. The state appointed all of their board of directors, the state owned the public access channel, the state had to approve every move made by the public access channel. So I think that's an important point here because the state actor analysis just can't be skipped; there's no controlling authority for doing that.

Where Mr. Perry speaks about government fiat, if you trace back the genesis of this government fiat idea where by government fiat you can create a public forum, that only applies in the context of public property. The government fiat cases stem from -- the original case was the peri-educational Supreme Court case. In that case it dealt with government property that was being used that the government decided to use [26]for a public purpose. That's not the case here.

Your Honor, where plaintiffs talk about the idea behind *Cornelius*, that Supreme Court case that talked

about private property being dedicated for public use, *Cornelius* did not deal with private property being dedicated to public use; it dealt with government property. And the point about public property being designated for -- public property being dedicated to public use was *dicta* basically, and it's never been cited approvingly by any controlling court since.

The other Supreme Court cases that Mr. Perry talked about, the *Mailbox* case, the *Pruneyard* case -- well, the *Pruneyard* case was under California law, so that doesn't have any relevance here. The *Mailbox* case, as Mr. Perry notes, that private property was found not to be a public forum because it was private property.

In fact, the New York Court of Appeals has said that the analysis needs to go in the direction of first establishing a state actor, and then finding it to be a public forum. And that's in the *SHAD v. Smith Haven Mall* case. And it said that while in that case it was dealing with a shopping mall, while it may have some of the attributes of a public forum, it may be tempting to consider it a public forum, you first have to go through the state actor analysis. In that case, the state actor analysis, after that analysis was made, none of the tests were met, and so the Court said, We are not going any further; [27]there's no constitutional violation here.

As for *Loce*, I agree with your Honor, I don't think there's any difference with respect to the state actor analysis as between a public access channel or a leased channel. The state actor inquiry does not change based

upon what kind of state actor you're dealing with. The tests are meant to apply in any kind of context. The section that your Honor read from *Loce*, we submit, explains why MNN is not a state actor.

I did want to reiterate that we weren't saying that MNN has unfettered discretion; it is, of course, bound by the regulations set forth by the PSC and by the grant agreement and by the franchise agreement between the city and Time Warner that MNN behave in a nondiscriminatory and allow access on a first come, first serve basis.

THE COURT: Thank you, Ms. Wise.

Anything further, Ms. Stitelman?

MS. STITELMAN: No, your Honor.

THE COURT: All right.

Anything further, Mr. Perry?

MR. PERRY: Could I respond to a point?

THE COURT: Just for a minute, sure.

MR. PERRY: Just for a minute.

In terms of the analysis that opposing counsel just suggested, first you have to look at whether there's state action, and then you look at whether there's a public forum,

I [28]think looking at those cases that opposing counsel cited, it's simply the sequence of --

THE COURT: Your argument is that they are intertwined.

MR. PERRY: That's right. That's right.

THE COURT: I got it in your brief.

MR. PERRY: Got it. All right. Thank you, your Honor.

THE COURT: All right.

Counsel, thank you for your arguments.

Decision reserved.

Have a good afternoon.

****