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CATEGORIZING WAYNE’S WORLD: THE PUBLIC FORUM DOCTRINE AND PUBLIC ACCESS CHANNELS

Abstract: On February 9, 2018, the United States Court of Appeals for the Second Circuit held, in *Halleck v. Manhattan Community Access Corp.*, that a public access channel administered by the Manhattan Community Access Corporation and three of its employees was a public forum. In doing so, the court determined that a complaint against Manhattan Community Access Corporation and those three employees sufficiently alleged state action. The legal status of public access channels has been unsettled since 1996, when the Supreme Court explicitly chose not to decide whether public access channels were public forums in *Denver Area Educational Telecommunications Consortium v. FCC*. This Comment argues that the Second Circuit correctly determined that the public access channels at issue in *Halleck* were public forums, while refraining from making a sweeping proclamation about all public access channels. This Comment further argues that such a broad categorization would be unwise since public access channels have differing characteristics, particularly in light of the fact that public access channels are negotiated between individual cable operators and franchising authorities.

INTRODUCTION

Public access channels allow individuals not affiliated with the cable operator to broadcast non-commercial television shows on a channel dedicated to public access programs at no cost.¹ A key feature of these channels is that they allow people to share their messages without censorship.² The foundations of

¹ See LAURA R. LINDER, PUBLIC ACCESS TELEVISION: AMERICA’S ELECTRONIC SOAPBOX, at xxvi (1999) (providing functional and philosophical definitions of public access channels); see also *Denver Area Educ. Telecomms. Consortium v. FCC (Denver Area)*, 518 U.S. 727, 791 (1996) (Kennedy, J., concurring in part and dissenting in part) (describing public access channels as available at little or no cost to the public on a “first-come, first-served basis,” detailing the programmer’s complete control over, and liability for, the content of the program, and noting that the technical aspects of the channel may be run by the cable operator, local government, or a third party).

² See LINDER, *supra* note 1, at xxvi (stating public access channel users can put forth their messages to local viewers without it being “edited, filtered, or altered”). In New York, state regulations specify that channel time is granted on a “first-come, first-served,” non-discriminatory basis, that users are not charged, that the municipality cannot exercise editorial discretion, and that the cable operator generally cannot exercise editorial discretion over use of the channel. N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4 (2018). The prohibition on editorial discretion does not apply to decisions prohibiting the airing of “obscenity or other content” that that is not protected by the First Amendment. See *id.* § 895.4(c)(8).

public access channels in the United States can be traced to the 1960s.³ The issue of whether public access channels are public forums has been extremely divisive, leading Supreme Court Justices to reach differing conclusions the last time the issue was considered in 1996.⁴ The Second Circuit addressed this question in February 2018, in *Halleck v. Manhattan Community Access Corp.* (“*Halleck II*”), weighing in on an issue that previously divided courts.⁵

Part I of this Comment expands on the history of public access channels and details the Second Circuit’s *Halleck II* decision.⁶ Part II details the legal status of public access channels as public forums.⁷ Part III argues that courts should decide whether public access channels are public forums on a case by case basis depending on whether the government controls the channel.⁸

I. THE FACTS AND HISTORY OF *HALLECK* AND PUBLIC ACCESS CHANNELS

Section A of this Part provides an overview of the history of, and basic law surrounding, public access channels.⁹ Section B then details the facts of the Second Circuit’s *Halleck II* case.¹⁰ Section C of this Part discusses the procedural history of *Halleck II*, and the current state of the litigation.¹¹

A. *The History of Public Access Channels*

In 1969, the Federal Communications Commission (FCC) recommended that cable operators set up public access channels in order to provide a platform for members of the community to share their message and to offer spaces

³ See LINDER, *supra* note 1, at 1–4 (noting that the rise of public access channels began in the 1960s in response to the Public Broadcasting Act of 1967 and Challenge for Change, an organization formed by the National Film Board of Canada to combat poverty by promoting change through film).

⁴ See generally *Denver Area*, 518 U.S. at 731 (showing that when the issue was first considered by the Supreme Court the Justices reached widely varying opinions). Regarding the pertinent issue of whether public access channels are public forums, Justice Breyer delivered an opinion joined by Justices Stevens, O’Connor, and Souter, explicitly declining to answer the question. *Id.* at 742. Justice Kennedy delivered an opinion, joined by Justice Ginsburg, concluding that public access channels are public forums. *Id.* at 783. Justice Thomas delivered an opinion, joined by Chief Justice Rehnquist and Justice Scalia, concluding that public access channels are not public forums. *Id.* at 831.

⁵ See *Halleck v. Manhattan Cmty. Access Corp. (Halleck II)*, 882 F.3d 300, 308 (2d Cir. 2018) (deciding the issue of whether a public access channel is a public forum and recognizing that district courts have reached different results). Compare *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005) (stating that for purposes of determining whether a cable operator is taking state action, public access channels are not public forum), with *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1341–42 (N.D. Ga. 1999) (stating that cable operator’s cablecasting facilities are a designated public forum).

⁶ See *infra* notes 9–57 and accompanying text.

⁷ See *infra* notes 58–83 and accompanying text.

⁸ See *infra* notes 84–103 and accompanying text.

⁹ See *infra* notes 12–39 and accompanying text.

¹⁰ See *infra* notes 40–51 and accompanying text.

¹¹ See *infra* notes 52–57 and accompanying text.

for communication that were not controlled by the cable operator.¹² In 1972, the FCC released a report that required cable operators in the top one hundred markets to reserve three channels for public, educational, and governmental (“PEG”) access.¹³ Moreover, the report stated that cable operators could not censor or control the content broadcast on public access channels and would not be liable for that content.¹⁴ In 1976, the FCC amended the 1972 rules, placing less stringent public access requirements on cable providers.¹⁵ The FCC emphasized that, while it continued to recognize the benefit public access channels could bring, the abstract potential was outweighed by the negative impact of high costs and capacity limitations on cable operators.¹⁶

¹² See Laura Stein, *Can the First Amendment Protect Public Space on U.S. Media Systems? The Case of Public Access Television*, 5 COMM. L. & POL’Y 349, 357 (2000) (describing the Federal Communications Commission (FCC) recommendation and its underlying reasoning). The FCC did not implement any rules requiring public access channels at that time because the Commission felt the issue needed to be studied further, though it hinted that such rules could be implemented in the future. See First Report & Order, 20 F.C.C.2d 201, 205 (1969) (stating that, despite the lack of action at the time, public access channels might eventually be required). The FCC also stated that cable operators should act as common carriers on some designated channels and provide studios and technical assistance for those channels with no control over the content of the channel. See *id.* at 207 (stating the FCC’s desire for cable operators to act as common carriers but reiterating that no action would be required until further studies had been done).

¹³ See Cable Television Report & Order, 36 F.C.C.2d 143, 190, 197 (1972) (stating that cable operators must supply one public access, one government, and one education channel and laying out the reasoning why the top one hundred markets were chosen). The public access channels were to be non-commercial, offered on a non-discriminatory, “first-come, first-served basis” that were free of charge (except those incurred for production cost). See *id.* at 190–91. Although the regulations only applied to operators in the top one hundred markets, they permitted local franchising authorities in other markets to require cable operators to provide public access channels; however, those channel requirements could not be greater than those that the regulations apply to the top one hundred markets. See *id.* at 194 (allowing the imposition of regulations in localities not covered by the regulation, but placing limits on those regulations).

¹⁴ See *id.* at 195–96 (describing the content-related obligation of cable operators and addressing concerns of potential liability). The report explained that imposing state liability on an entity that could not control what is broadcast on public access channels could unconstitutionally frustrate the non-censorship requirement that had “the force of law.” *Id.* at 196. The FCC noted that the rules forbade the showing of obscene or indecent material. *Id.* at 194.

¹⁵ See Stein, *supra* note 12, at 357–58 (explaining that the regulations required cable systems with 3,500 or more subscribers to provide access channels, “scal[ing] back its formerly high expectations of cable operators”).

¹⁶ See Report & Order, 59 F.C.C.2d 294, 296 (reiterating the FCC’s commitment to maintaining public access channels but recognizing cost concerns). The new rules required cable operators with over 3,500 subscribers to provide public access, even if they were not in a top one hundred market. *Id.* at 297. The FCC noted that under the new rules, 50% of all cable subscribers would be using a system that met the 3,500 subscriber threshold. *Id.* at 305. The FCC also acknowledged that the fact that high costs and a lack of demand underlined their decision to remove the requirements on smaller operators in major markets could justify barring local franchising authorities from imposing requirements on operators with less than 3,500 subscribers, but the FCC elected to continue to allow local franchising authorities to require public access. See *id.* at 324 (describing the FCC’s logic in continuing to allow local authorities to use their own discretion in imposing requirements).

In January 1979, in *FCC v. Midwest Video Corp.*, the Supreme Court struck down the FCC's 1972 rules and 1976 amendments regarding public access channels as unconstitutional.¹⁷ In that case, the Court ruled that the FCC had exceeded its statutory authority granted to it in the Communications Act of 1934, because it regulated cable systems as common carriers.¹⁸ Despite the ruling of the Court of Appeals for the Eighth Circuit that the FCC's access rules violated the cable operator's First Amendment rights, the Supreme Court's decision in *Midwest Video Corp.* was based solely on its interpretation of the statute and explicitly declined to address the potential First Amendment issues.¹⁹ The Court held that the FCC could not require public access channels without authorization from Congress, but did not address the constitutionality of such a hypothetical enabling statute.²⁰ Despite this decision, the number of public access channels continued to grow in communities around the country.²¹

Five years later, Congress provided legislative support for public access channels in the Cable Communications Policy Act of 1984.²² The Act provided statutory authorization for franchising authorities to require channel capacity for PEG channels when granting franchises to cable operators.²³ Cable operators were prohibited from exercising any control over what was shown on PEG channels proscribed by the Act.²⁴ Further, under the Act cable operators could

¹⁷ See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708–09 (1979) (stating that in light of Congress hesitation on the issue the Commission exceeded its authority by putting forth the access rules and regulating cable operators as common carriers).

¹⁸ *Id.* Although the Communication Act of 1934 was passed before cable television was invented, it still gave the FCC its authority. See *id.* at 696 (stating that, although the Communication Act of 1934 was passed before cable television came into existence and therefore did not explicitly address television, the Court had previously ruled that the Act applied to cable operators) (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968)).

¹⁹ See *id.* at 709 n.19 (stating that First Amendment concerns did not sway the Court's decision).

²⁰ *Midwest Video Corp.*, 440 U.S. at 709.

²¹ See LINDER, *supra* note 1, at 9–10 (describing the growth of public access channels around the country including one program that began in 1978 in Austin, Texas, titled "Alternative Views," which covered news usually ignored by mainstream media including shutting down the CIA, black power, and de-nuclearization).

²² The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 601, 98 Stat. 2779 (codified as amended at 47 U.S.C. § 605 (2012)); see Stein, *supra* note 12, at 359 (stating the Cable Communications Policy Act of 1984 was the first congressional approval of public access channels). Congress was motivated by the cable industry's desire for less regulation, and in light of *Midwest Video Corp.*, it became evident that Congress needed to clarify whether public access channel requirements would be mandated or whether it would continue to be up to the franchising authority and cable operator to decide in negotiations for a franchise whether they were required. *Midwest Video Corp.*, 440 U.S. at 708–09; see LINDER, *supra* note 1, at 11 (describing Congress's motivating factors).

²³ See Cable Communications Policy Act, § 611(b), 98 Stat. at 2782 (codified as amended at 47 U.S.C. § 531) (granting authority to localities to impose requirements on cable operators).

²⁴ *Id.* at § 611(e).

not be held liable for programs shown on PEG channels.²⁵ A congressional report on the Act, in justifying the authority given to municipalities to require public access channels, referred to them as the “video equivalent of the speaker’s soap box” and stated they would help provide a diversity of information to the public.²⁶ The report further made the argument that the Act did not violate the First Amendment.²⁷ Despite this congressional direction, lower courts that addressed the constitutionality of the public access portion of the Act were divided.²⁸

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act, which changed the nature of PEG channels.²⁹ The Act required the FCC to enable cable operators to prohibit any programming on PEG channels that contained obscene or sexually explicit content, and content promoting illegal conduct.³⁰ The Act also made cable operators liable for obscene

²⁵ See *id.* at § 638, 98 Stat. at 2801 (codified as amended at 47 U.S.C. § 558) (clarifying that cable operators could be held liable for programming shown, except for that which was shown on PEG channels).

²⁶ H.R. REP. NO. 98-934, at 30 (1984). The report further stated that public access channels allowed those who would not have access to broadcast on television channels the power to become a voice in the “electronic marketplace of ideas.” *Id.* The term “speaker’s soap box” refers to the practice of speakers standing on soapboxes while giving speeches. See Thomas U. Walker, *Mounting the Soapbox*, 65 WESTERN FOLKLORE 65, 65 (2006) (describing “soapbox oratory” as spontaneous public speaking where the speaker would use a soapbox or similar object to raise themselves above their audience).

²⁷ See H.R. REP. NO. 98-934, at 31 (noting that the public access provision was a “content-neutral structural regulation” that served the goal of providing a diverse set of views to the audience, which the courts had held to be constitutional in the past).

²⁸ Compare *Mo. Knights of Ku Klux Klan v. Kansas City*, 723 F. Supp. 1347, 1351–52 (W.D. Mo. 1989) (holding that the public access channel created pursuant to the franchising agreement with the municipality was a public forum and the cable operator could not censor content), with *Century Fed., Inc. v. Palo Alto*, 648 F. Supp. 1465, 1476 (N.D. Ca. 1986) (holding that it is unconstitutional for a municipality to limit the First Amendment rights of a cable operator through franchising agreements).

²⁹ See Stein, *supra* note 12, at 360 (describing the changes brought about by the Cable Television Consumer Protection and Competition Act). Despite those changes, Congress made clear that it still supported public access channels. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a), 106 Stat. 1460 (reiterating congressional support for providing a diversity of views through public access channels as the cable industry had become dominated by a few operators with little potential for new competition).

³⁰ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(a), 106 Stat. at 1486 (amending the provisions regarding editorial control); see also 8 FCC Rcd. 2638, 2638 (1993) (stating that the Act gave cable operators editorial control over public access channels to prevent obscene materials). The rules defined the terms “obscenity,” “sexually explicit material,” and “soliciting or promoting unlawful conduct.” *Id.* at 2639–41. The FCC adopted the Supreme Court’s obscenity standard by requiring a finding that, applying contemporary community standards, the content “appeals to the prurient interest” and “lacks serious literary, artistic, political, or scientific value.” *Id.* at 2640 n.9; see *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth the Supreme Court’s obscenity standard). The FCC defined sexually explicit content as content that is indecent. 8 FCC Rcd. at 2640–41. The FCC defined soliciting or promoting unlawful conduct as content that would be interpreted as unlaw-

materials broadcast on public access channels.³¹ Following passage of the Cable Television Consumer Protection and Competition Act, the FCC promulgated rules that allowed cable operators to avoid liability by seeking certifications from programmers that the material to be broadcast did not contain any type of barred content.³²

In June 1995, in *Alliance for Community Media v. FCC*, the Court of Appeals for the District of Columbia Circuit directly addressed the constitutionality of the Cable Television Consumer Protection and Competition Act.³³ A group of organizations representing producers of programming for public access channels argued that the Act violated the free speech clause of the First Amendment.³⁴ The D.C. Circuit ruled that the public access channels were not public forums, despite the common carrier obligations imposed on the cable operators under the Act.³⁵ On appeal, in June 1996, in *Denver Area Educational Telecommunications Consortium v. FCC* (“*Denver Area*”), the Supreme Court decided that the provision of the Act permitting editorial control as a means to prevent the broadcast of specified content violated the First Amendment, because it was not appropriately tailored to achieve the Act’s objective of protecting children.³⁶ In a plurality opinion, the Court explicitly declined to

ful solicitation of a crime. *Id.* at 2641. The rules did not cover speech promoting lawful civil disobedience. *Id.*

³¹ See Cable Television Consumer Protection and Competition Act, § 10(d), 106 Stat. at 1486 (providing an exemption to general immunity for the broadcast of obscene material); see also 8 FCC Rcd. at 2638 (stating that the Act subjects cable operators to liability for obscene materials on public access channels).

³² 8 FCC Rcd. at 2642.

³³ See *All. for Cmty. Media v. FCC*, 56 F.3d 105, 110 (D.C. Cir. 1995) (stating the case is to review orders of the Federal Communications Commission putting the act into effect).

³⁴ See *id.* (describing the controversy at issue in the suit). The plaintiffs also challenged the provisions of the Act dealing with leased channels. *Id.*

³⁵ See *id.* at 123 (stating the conclusion of the court that public access channels are not public forums).

³⁶ See *Denver Area*, 518 U.S. at 733 (stating the conclusion of the Court that the Act was unconstitutional). The Court balanced the benefit of the cable operator correcting the mistakes of those overseeing the content of the channel with the risk that the cable operator could be mistaken and block programming that was not patently offensive. *Id.* at 763. Those competing interests were weighed in light of the fact that the Court did not find a significant trend of indecent programming on public access channels. *Id.* at 766. The Court concluded the government did not meet its burden of showing that the provision is “necessary to protect children or that it is appropriately tailored to secure that end.” *Id.* Justice Kennedy criticized the plurality opinion for not applying an established legal standard. See *id.* at 784 (Kennedy, J., concurring in part and dissenting in part) (referring to the plurality’s failure to articulate a standard as “disturbing”). He noted that Supreme Court precedent gives “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Id.* at 783 (Kennedy, J., concurring in part and dissenting in part) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994)). According to Justice Kennedy, the plurality fell short of applying a clear standard of scrutiny; however, realizing they had to adopt some standard, the plurality used the formulation “whether the Act properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech.” *Id.* at 786. Throughout the opinion the plurality used different phrases

decide whether public access channels are public forums.³⁷ Despite the plurality's decision not to address the public forum question, Justices Kennedy and Thomas filed separate opinions articulating the two different potential answers to the question.³⁸ Following *Denver Area*, federal courts have been divided as to whether public access channels should be considered public forums.³⁹

B. Factual Background of Halleck

The Manhattan News Network ("MNN") runs Manhattan's public access channels.⁴⁰ Deedee Halleck and Jesus Papoieto Melendez (collectively, the

such as "appropriately tailored", "sufficiently tailored", and "carefully and appropriately addressed." *Id.* Justice Kennedy criticized this lack of an articulated standard for manipulating established standards meant to protect free speech, and suggested that Congress has a greater ability to restrict speech having to do with emerging technologies such as public access channels because the Court does not know how to apply a standard. *Id.* at 786–87. Justice Thomas also criticized the plurality for failing to adopt a clear standard. *See id.* at 818 (Thomas, J., concurring in part and dissenting in part) ("This heretofore unknown standard is facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted . . . [R]elative rigidity is required by our precedents and is not of my own making.").

³⁷ *See id.* at 742 (plurality opinion) (stating it was too early to decide whether public access channels are public forums).

³⁸ *Id.* at 780–812 (Kennedy, J., concurring in part and dissenting in part); *id.* at 812–838 (Thomas, J., concurring in part and dissenting in part); *see* Stein, *supra* note 12, at 367 (describing Justice Kennedy's and Justice Thomas's differing opinions as two different ways in which Court could classify public access channels).

³⁹ *See Egli v. Strimel*, No. 14-6204, 2015 U.S. Dist. LEXIS 114312, at *10–12 (E.D. Pa. Aug. 28, 2015) (noting that whether forum analysis applies to public access channels is a difficult question, but that courts have held that the First Amendment protects free speech on those channels and "heightened scrutiny" applies to content restrictions); *Brennan v. William Patterson Coll.*, 34 F. Supp. 3d 416, 428 (D.N.J. 2014) (recognizing that a public access channel could be considered a public forum, but that such a holding requires a case by case analysis, and holding that the complaint at hand had a plausible claim regardless of whether the public access channel at issues was a public forum). *Compare Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 52 (D. Me. 2002) (holding that if forum analysis applies, public access channels should be treated as public forums), and *Jersawitz*, 71 F. Supp. 2d at 1341–42 (stating that cable operator's cablecasting facilities are a designated public forum while their production facilities and equipment are a nonpublic forum), with *Morrone*, 363 F. Supp. 2d at 558 (stating that for purposes of determining whether a cable operator is taking state action, public access channels are not public forum), and *Glendora v. Hostetter*, 916 F. Supp. 1339, 1341 (S.D.N.Y. 1996) (recognizing that public access channels are not First Amendment "public forums").

⁴⁰ *Halleck v. City of New York (Halleck I)*, 224 F. Supp. 3d 238, 240 (S.D.N.Y. 2016). The City of New York granted cable franchises to Time Warner Entertainment Company ("Time Warner"). *Id.* As part of the agreement, Time Warner set aside public access channels. *Id.* Pursuant to the agreement, the public access channels were administered by the community access organization ("CAO"), an "independent, not-for-profit, membership corporation," which was appointed by the Manhattan Borough President. *Id.* The Borough President appointed the Manhattan News Network ("MNN") to serve as the CAO. *Id.* MNN's mission 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 non-commercial uses of video facilities on an open and equitable basis." *Id.* The Manhattan Borough President has the power to select two of MNN's thirteen board members. *Id.* MNN's executive director is Daniel Coughlin, the programming director is Jeanette Santiago, and the manager of production and facilitation is Cory Brice. *Id.* at 239–40. Those

“Plaintiffs”) had been involved in producing content to be broadcast on MNN’s public access channels, but had a tumultuous relationship with MNN.⁴¹ That conflicting relationship culminated in July 2012, when MNN held an event for the opening of a community center.⁴² The Plaintiffs stood outside of the event and interviewed those in attendance.⁴³ Using the footage taken at the event, Halleck presented a video entitled “The 1% Visits the Barrio” (the “Video”) to MNN to be aired on their public access channels.⁴⁴ The Video expressed the view that MNN was “more interested in pleasing ‘the 1%’ than addressing the community programming needs of those living in East Harlem.”⁴⁵ The Video was aired on a public access channel in October 2012.⁴⁶

Halleck subsequently received a letter from MNN informing her that she was suspended from airing programs over MNN’s public access channels for three months.⁴⁷ The letter attributed the suspension to the Video’s violation of MNN’s program content restrictions which prohibited harassment or threats towards MNN staff and producers.⁴⁸ The Plaintiffs, however, contended that the suspension was actually imposed because the Video was critical of MNN.⁴⁹ In July 2013, the Plaintiffs inquired about Melendez’s status at MNN, and he was subsequently suspended indefinitely from using MNN’s services and facilities.⁵⁰ Following the Plaintiffs’ inquiry into Melendez’s status, Halleck was again suspended, this time for one year.⁵¹

third individuals were named as defendants in *Halleck I* along with MNN and New York City. *Id.* MNN’s facility in East Harlem is known as El Barrio. *Id.* at 240.

⁴¹ See *Halleck II*, 882 F.3d at 303 (describing the Plaintiffs’ actions and relationship with MNN). In December 2011, MNN barred Halleck and others from entering an MNN board meeting. *Halleck I*, 224 F. Supp. 3d at 240–41. On March 14, 2012, the Plaintiffs attended a board meeting after receiving an invitation from defendant Coughlin. *Id.* at 241. Halleck began to videotape the meeting and it was immediately ended. *Id.* Soon after, defendant Morales spoke with Melendez and called him a “traitor.” *Id.* On March 23, 2012, Melendez and defendant Morales met to discuss MNN’s “community leadership program.” *Id.* Defendant Morales screamed and threw papers at Melendez and subsequently withdrew Melendez’s invitation to participate in the program. *Id.* The reason given for the withdrawal was Melendez’s behavior on March 23, but the Plaintiffs believe the real reason was that Melendez had gone to the board meeting on March 14 that was videotaped by Halleck. *Id.*

⁴² *Halleck II*, 882 F.3d at 303. The opening of the community center was an invitation-only formal ceremony. *Halleck I*, 224 F. Supp. 3d at 241.

⁴³ *Halleck II*, 882 F.3d at 303.

⁴⁴ *Id.* The Video can be viewed at: <https://www.youtube.com/watch?v=QEbMTGEQ1xc>.

⁴⁵ *Halleck II*, 882 F.3d at 303.

⁴⁶ *Id.*

⁴⁷ *Id.* The letter was sent by defendant Santiago and dated October 11, 2012. *Id.*

⁴⁸ *Id.* Defendant Santiago claimed in the letter that Melendez made statements in the video that were intended to incite violence and harass the staff. *Halleck I*, 224 F. Supp. 3d at 241.

⁴⁹ *Halleck II*, 882 F.3d at 303.

⁵⁰ *Halleck I*, 224 F. Supp. 3d at 241. Defendant Coughlin claimed that Melendez threatened and shoved him during the July meeting. *Id.* The Plaintiffs alleged that Melendez was suspended because of the views he expressed in the Video. *Halleck II*, 882 F.3d at 303.

⁵¹ *Halleck I*, 224 F. Supp. 3d at 241–42. Defendant Coughlin claimed the suspension was the result of complaints MNN continued to receive about the Video. *Id.*

C. Halleck's Procedural History

In December 2016, in *Halleck v. City of New York* (“*Halleck I*”), the Plaintiffs asserted claims of a First Amendment violation under 42 U.S.C. § 1983 against New York City, MNN, and three MNN employees.⁵² The district court acknowledged that the claims against MNN and its employees were only viable if MNN was a state actor, because the First Amendment only applies to government action, but determined MNN was not.⁵³ The district court also considered whether the public access channels at issues were public forums because they were created by a government order, but decided the channels were not.⁵⁴ Because MNN was not a state actor and the channels were not public forums, the district court dismissed the First Amendment claims because there was no government action.⁵⁵ In *Halleck II*, the Second Circuit reversed the district court’s decision as to MNN and its employees, but affirmed the dismissal as to the City.⁵⁶ In doing so, the Second Circuit held that the pub-

⁵² *Id.* at 239. The Plaintiffs also brought state law claims under the State Free Speech Guarantee and the Open Meeting Law, but the district court declined to exercise jurisdiction over them. *Id.* 42 U.S.C. § 1983 provides for a civil remedy against an individual acting under color of state law who deprives another person of rights guaranteed by the Constitution, holding them liable to the injured party. 42 U.S.C. § 1983 (2012).

⁵³ *Halleck II*, 882 F.3d at 303. The court weighed whether MNN’s actions could be considered government action under the Supreme Court’s *Lebron v. National Railroad Passenger Corp.* holding. *See Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) (holding where the government creates a corporation for the furtherance of government objectives and retains permanent authority to appoint a majority of the directors, the corporation is part of the government for First Amendment purposes); *Halleck II*, 882 F.3d at 303–304 (deciding *Lebron* did not apply because the government only had the authority to appoint two of the thirteen MNN board members).

⁵⁴ *See Halleck II*, 882 F.3d at 304 (describing the decision and logic of the district court judge). The district court decided the channels were not public forums because the “ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State” and because the court read Second Circuit precedent to implicitly reject that public access channels were public forums. *Id.* In June 1999, the Second Circuit had addressed a defendant’s suspension for programming on a leased channel. *See Loce v. Time Warner Entm’t/Advance Newhouse P’ship*, 191 F.3d 256, 268 (2d Cir. 1999) (stating that defendant suspended plaintiffs for violating the indecent programming policy). There, the Second Circuit ruled that the First Amendment restrictions did not apply to the cable operator that provided the public access channels because the operator’s maintenance of the channels did not constitute state action. *See id.* at 267. The district court read *Loce* to implicitly reject the argument that public access channels are designated public forums and the district court agreed with that conclusion. *See Halleck II*, 882 F.3d at 304 (stating that the district court judge read *Loce* to reject the public forum argument).

⁵⁵ *Halleck II*, 882 F.3d at 304.

⁵⁶ *See id.* at 308 (stating the conclusion of the court reversing the district court’s decision regarding MNN and upholding the decision regarding the City). The dismissal as to the city was upheld because the Second Circuit agreed with the district court that municipal liability under § 1983 only arises when the action taken was municipal policy and the policy at issue was not municipal policy. *Id.*

lic access channels administered by MNN were public forums, and MNN and its employees were therefore constrained by the First Amendment.⁵⁷

II. THE PUBLIC FORUM DOCTRINE'S APPLICABILITY TO PUBLIC ACCESS CHANNELS

Section A of this Part provides a basic overview of the public forum doctrine.⁵⁸ Section B then details the conflicting opinions of Justice Thomas and Justice Kennedy in *Denver Area*, and their application of the doctrine to public access channels.⁵⁹ Section C discusses the Second Circuit's *Halleck II* decision, and that court's application of the public forum doctrine to public access channels.⁶⁰

A. The Public Forum Doctrine

The public forum doctrine dictates that the state's ability to regulate expression in places that historically or by government authorization have been dedicated to the free exchange of ideas is very limited.⁶¹ The Supreme Court has recognized two types of public forums.⁶² The first type of public forum is a public place that has historically been used for open communication and debate between citizens.⁶³ In this type of public forum, referred to as the traditional public forum, the state must satisfy strict scrutiny to exclude certain communications on the basis of the communication's content.⁶⁴ The second

⁵⁷ *Id.* The Second Circuit did not view *Loce* in the same light as the district court. *See id.* at 307 (noting that *Loce* concerned leased television channels which existed to promote competition and delivery diverse sources of programming, while public access channels existed to give the public the opportunity to express its views, and that the different purposes of each underscore why public access channels were public forums). Poignantly, the court noted “[I]leased channels concern economics” and that “[p]ublic access channels concern democracy.” *Id.*

⁵⁸ *See infra* notes 61–66 and accompanying text.

⁵⁹ *See infra* notes 67–78 and accompanying text.

⁶⁰ *See infra* notes 79–83 and accompanying text.

⁶¹ *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (defining the public forum doctrine).

⁶² *See id.* at 45–46 (recognizing the traditional public forum, the designated public forum which is public property that has been opened up for expressive activity, and a distinct third type of public property which is not considered a public forum).

⁶³ *See id.* at 45 (describing the traditional public forum). Public streets and parks are the archetype examples of the traditional public forum. *Id.* Streets and parks have historically been held in trust for public use; the use of these places for discussions between citizens is a longstanding tradition and is considered a right of citizens. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (describing the historical role of streets and parks as public forums). The right to speech in these public places cannot be limited, but it may be regulated in the interest of all and must be compatible with peace, order, and comfort of all. *Id.* at 515–16.

⁶⁴ *See Perry*, 460 U.S. at 45 (stating that in order to pass strict scrutiny, the state must show the regulation “is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end”); *see also* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen*

type of public forum, public property that the state opens for the public to use for expressive activity, is referred to as a designated public forum and is held to the same standard as a traditional public forum.⁶⁵ A designated public forum is created when the government opens property, that does not qualify as a traditional public forum, for the public or a class of speakers to use for “expressive activity.”⁶⁶

B. Kennedy v. Thomas: Differing Views on the Applicability of the Public Forum Doctrine to Public Access Channels

In *Denver Area*, Justice Kennedy and Justice Thomas laid out conflicting opinions on whether public access channels should be considered public forums.⁶⁷ Justice Kennedy articulated the argument for holding that public access channels are designated public forums.⁶⁸ Justice Kennedy opined that a forum does not have to be owned by the government to be a public forum, so the public access channels could be public forums even though they are owned by the cable operator.⁶⁹ Justice Kennedy stated that the case did not warrant a broad proclamation of whether the government can make private property a public forum.⁷⁰ Looking at the specific case of public access channels, Justice Kenne-

Speech Under the First Amendment, 57 B.C. L. REV. 1237, 1271 (2000) (stating that scrutiny increases when there are limitations on speech in a public forum and lessens when the restrictions are in a non-public forum or limited public forum). Strict scrutiny is used to determine the constitutionality of laws that violate a person’s fundamental rights such as free speech, or equal protection. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799–802 (2006) (describing the birth of the strict scrutiny doctrine, its test, and its application).

⁶⁵ See *Perry*, 460 U.S. at 45–46 (noting that, while the state is not required to keep designated public forums open to the public, as long as it does so the same rules governing traditional public forums apply); see also *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1982) (declaring that when a state university placed a content-based exclusion on a religious group holding meetings in university facilities where it regularly allowed student groups to meet, the university had to show the exclusion served a compelling state interest and was narrowly drawn to serve that interest).

⁶⁶ See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678–80 (1998) (describing the difference between designated public forums, which are generally open to a category of speakers, and nonpublic forums, where there is selective access and individuals must obtain permission to use the property).

⁶⁷ Compare *Denver Area Educ. Telecomms. Consortium v. FCC (Denver Area)*, 518 U.S. 727, 780–812 (1996) (Kennedy, J., concurring in part and dissenting in part) (concluding that public access channels are public forums), with *id.* at 812–38 (Thomas, J., concurring in part and dissenting in part) (concluding that public access channels are not public forums).

⁶⁸ See *id.* at 780–84 (Kennedy, J., concurring in part and dissenting in part) (stating that public access channels are public forums and referring to the plurality’s decision not to adopt an established legal standard as the most troubling aspect of the opinion). Justice Kennedy referred to the advent and following of standards the “central achievement of our First Amendment jurisprudence.” *Id.* at 785.

⁶⁹ See *id.* at 792 (comparing public access channels to privately owned streets and sidewalks because they are public forums that exist over property that is owned by a private party).

⁷⁰ See *id.* at 793 (noting the hesitancy of the plurality to classify public access channels as public forums and explaining their reluctance is misguided).

dy wrote that it is clear that when the government and a private party contract to allow the government to use private property for public expression, a public forum is created.⁷¹ Justice Kennedy noted that a public forum designation carries significant weight because content based regulations in a designated public forum are subject to strict scrutiny, meaning they must be “narrowly drawn to achieve a compelling state interest.”⁷²

In his opinion, Justice Thomas maintained that public access channels are not public forums.⁷³ Justice Thomas stated that the case cited by Justice Kennedy to support the notion that private land designated for public use can be a public forum did not apply to public access channels because that case involved “enforceable public easements.”⁷⁴ Justice Thomas argued that public forum cases in the past dealt with property that the government had a recognized property interest in, which allowed the government to act as the owner of the property and designate it as a public forum.⁷⁵ According to Justice Thomas, although public access channels were required by local governments, there was no indication that the franchising authority took a property interest in the channels and thus could not designate them as public forums.⁷⁶ Justice Thomas pointed out that in no other recognized public forum did a private entity have to help create and broadcast the speaker’s message.⁷⁷ Justice Thomas wrote that in traditional public forums the government must be the one to enforce the forum’s openness, but that it was often the cable operators that bear the burden of enforcing the openness of and administering public access channels.⁷⁸

⁷¹ *See id.* at 794 (describing how public access channels are created and in explaining in those cases where the government contracts to use private property for public expression a public forum is created).

⁷² *Id.*; *see id.* at 826 (Thomas, J., concurring in part and dissenting in part) (agreeing that “content-based prohibitions in a public forum must be narrowly drawn to effectuate a compelling state interest”).

⁷³ *Denver Area*, 518 U.S. at 826 (Thomas, J., concurring in part and dissenting in part) (arguing that public access channels are not public forums).

⁷⁴ *See id.* at 827 (stating that “private property dedicated to public use” refers to designated land for streets and parks during the subdivision of land for developments which “at least created an enforceable public easement”).

⁷⁵ *See id.* at 828 (recognizing cases where the government has found private property to be a public forum because of government property interest). Justice Kennedy attempted to refute this point in his opinion by stating property law recognizes many ways to create an enforceable easement, including through contract. *See id.* at 794 (Kennedy, J., concurring in part and dissenting in part) (rebutting Justice Thomas’s assertion that a formal easement is necessary).

⁷⁶ *See id.* at 828 (Thomas, J., concurring in part and dissenting in part) (citing cases in which a formal property interest existed).

⁷⁷ *See id.* at 829 (pointing out cable operators often have to manage and to some extent control the public access channel they provide).

⁷⁸ *See id.* at 830 (comparing the nature of public access channels and their administration by private cable operators to that of traditional public forum which are usually run by the government).

C. The Second Circuit's Application of the Public Forum Doctrine to Public Access Channels

In *Halleck II*, the Second Circuit addressed the question the Supreme Court refused to answer in *Denver Area* and lower courts have been divided on: should public access channels be considered public forums?⁷⁹ After considering the numerous opinions in *Denver Area*, the Second Circuit adopted the view espoused by Justice Kennedy.⁸⁰ The Second Circuit did not decide whether the public access channels at issue were public forums based solely on their role as the electronic version of a “public square.”⁸¹ Instead, the court concluded that the public access channels at issue were public forums because of the specific characteristics they possessed, specifically that federal law authorized the channels, state law and the municipality required the channels, and the municipality put in place a private entity to run the channels.⁸² The Second Circuit held that public access channels authorized by Congress to be “the video equivalent of the speaker’s soapbox” and operating under the powers granted by a municipality as seen in *Halleck II*, are public forums.⁸³

III. PUTTING THE PUBLIC IN PUBLIC FORUM

By ruling that the public access channels at issue in *Halleck II* were public forums, the Second Circuit ensured that the channels would fulfill their intended purpose to give the members of the public the ability to express their views via electronic communication without censorship.⁸⁴ The court did not hold that public access channels are public forums solely because of the func-

⁷⁹ See *Halleck v. Manhattan Cmty. Access Corp. (Halleck II)*, 882 F.3d 300, 308 (2d Cir. 2018) (addressing the public forum issue). The court noted that whether the plaintiffs’ claim was viable depended on whether MNN’s actions were state action. *Id.* at 304. Public forums are usually operated by the state, so the question of whether there has been state action is usually answered by determining whether the place in question is a public forum. *Id.* at 306. The public access channels in the case were operated by MNN, a private not for profit corporation. *Id.* at 307. The court then had to analyze whether the individuals who took the action in the public forum were adequately connected to the municipality such that they are deemed state actors. *See id.* (analyzing MNN’s relationship to the municipality). The court determined that MNN employees could be considered state actors because their authority to run the public access channels was given to them by the municipality and thus they were not “interlopers in a public forum.” *Id.*

⁸⁰ *See id.* at 306 (explaining the different opinions in *Denver Area* and stating the Second Circuit was “persuaded by the conclusion reached by Justices Kennedy and Ginsburg”).

⁸¹ *Id.*

⁸² *See id.* (outlining the traits of the specific public access channel at issue). The Second Circuit also recognized that a state regulation permitted cable operators to censor content not protected by the First Amendment. *Id.* at 306 n.7.

⁸³ *Id.* at 308.

⁸⁴ *See Halleck v. Manhattan Cmty. Access Corp. (Halleck II)*, 882 F.3d 300, 307–08 (2d Cir. 2018) (stating that public access channels are “the video equivalent of the speaker’s soap box or the electronic parallel to the printed leaflet”).

tion they perform, instead ruling that the channels at issue in *Halleck II* were public forums because of their specific characteristics, one of which was that the municipality gave a private corporation the power to run the channels.⁸⁵ One of the keys to the Second Circuit's decision was that the channels were operated by an entity deemed to be a state actor, not a private cable operator.⁸⁶ This is the appropriate standard by which future public access channel cases raising the public forum question should be decided.⁸⁷

The reasoning that who controls the channel matters is in line with the Second Circuit's pre-*Halleck II* precedent concerning leased public access channels.⁸⁸ In the Second Circuit's earlier *Loce v. Time Warner Entertainment Advance/Newhouse Partnership* decision, the defendant was the cable operator.⁸⁹ There the Second Circuit found that neither the cable operator's policy nor its decision not to air the plaintiff's programming was state action.⁹⁰ Unlike in *Halleck II*, there was no evidence of government action apart from granting the franchise agreement and federal law mandating the maintenance of leased access channels.⁹¹ This reasoning is also in line with the decisions of lower courts and other circuits that have decided the public forum doctrine is applicable to channels run by public entities or private entities deemed to be taking governmental action.⁹²

⁸⁵ See *id.* at 306 (specifying the municipality gave MNN the power to run the channel). The regulations the plaintiffs were charged with violating and the facilities in question were those of MNN, not the cable operator. See *id.* at 303 (stating that the plaintiffs allegedly violated the content restrictions of MNN). The franchise agreement required MNN to promulgate rules and regulations, and to maintain open channel access, production assistance and production tools. *Halleck v. City of New York (Halleck I)*, 224 F. Supp. 3d 238, 240 (S.D.N.Y. 2016). The Second Circuit determined that the actions of MNN were appropriately connected to the municipality to be considered state actors because the action they took was pursuant to the authority given to them by the municipality. See *Halleck II*, 882 F.3d at 307 (outlining the connection between MNN and the municipality).

⁸⁶ See *Halleck II*, 882 F.3d at 307 (stating a connection to the municipality was established in the case because MNN's power was given to them by the municipality).

⁸⁷ See *id.* (ensuring there is a sufficient connection to a municipality to establish state action).

⁸⁸ See *id.* (pointing out the different purposes of public access channels and leased access channels).

⁸⁹ See *Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 258 (2d Cir. 1999) (stating the plaintiffs were suing the cable operator because the operator would not broadcast plaintiffs' programming due to it violating the policy of the operator).

⁹⁰ See *id.* at 267 (stating the fact that federal law mandated the cable operator have leased access channels and the cable operator's franchise was granted by the municipality was not enough to classify their actions as state actions).

⁹¹ See *Halleck II*, 882 F.3d at 307 (finding state action); *Loce*, 191 F.3d at 266–67 (finding a lack of state action).

⁹² See *Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1398, 1402 n.4 (8th Cir. 1997) (stating that a public access channel operated by "regulatory and advisory board" and created by the city council would normally be considered a public forum, but due to the *Denver* decision, doubt was cast on that classification); *Wilcher v. City of Akron*, No. 5:05-CV-0866, 2005 U.S. Dist. LEXIS 9470, at *25 (N.D. Oh. May 13, 2005) (stating that public access channel was not a public forum because the channel was owned and controlled by the cable operator, supervision of the channel

In his concurrence in *Denver Area*, Justice Kennedy stated that public forums can exist beyond the confines of government property.⁹³ Justice Kennedy's pronouncement finds support in the Supreme Court's decision in *Cornelius v. NAACP Legal Defense and Educational Fund*, where the Court held that "private property dedicated to public use" can be subject to the First Amendment.⁹⁴ Further support can be seen in *Southeastern Promotions, Limited v. Conrad*, where the Supreme Court stated that a private theatre under a long-term lease to the city was a public forum.⁹⁵

The provision of the Cable Television Consumer Protection and Competition Act at issue in *Denver Area* allowed cable operators to exercise editorial discretion over offensive sexual material on public access channels.⁹⁶ Allowing the cable operators to exercise editorial control meant that the channels would, at the very least, be jointly operated by the cable operator and the authority managing the public access channel (if not the cable operator).⁹⁷ Despite declining to apply the public forum doctrine to public access channels, the Court decided to strike down the provision and bar cable operators from exercising editorial discretion over public access channels.⁹⁸ That bar allowed for the situation the Second Circuit addressed in *Halleck II*, where the municipality created an agreement that removed the cable operator from the management of the public access channels they provided.⁹⁹

was not conducted by the municipality, and the municipality only had "indirect regulatory control" over the public access channel); *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 554, 558 (E.D.N.Y. 2005) (deciding that public access channels were not public forums and the cable operator controlling the channel at issue was not a state actor); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 84, 93 (D. Mass. 2002) (declining to decide if "municipally authorized and operated" public access channel was technically a public forum, while still applying strict scrutiny); *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1332-33, 1341 (N.D. Ga. 1999) (ruling public access channel managed by a non-profit corporation granted authority by the municipality was a designated public forum); *Glendora v. Marshall*, 947 F. Supp. 707, 712 (S.D.N.Y. 1996) (stating that cable operator managing public access channel was not a state actor); *Britton v. City of Erie*, 933 F. Supp. 1261, 1264-65, 1268 (W.D. Pa. 1995) (deciding public access channel operated by local access authority was a public forum), *aff'd*, 100 F.3d 946 (3d Cir. 1996).

⁹³ *Denver Area*, 518 U.S. at 792 (1996) (Kennedy, J., concurring in part and dissenting in part).

⁹⁴ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). Justice Thomas pointed out in his *Denver Area* opinion that the statement was dicta which was taken out of context. *Denver Area*, 518 U.S. at 827 (Thomas, J., concurring in part and dissenting in part).

⁹⁵ *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 547, 552 (1975) (describing the theater as a public forum). A private party was not in charge of enforcing the public forum, as the board members of the theatre were appointed by the city's mayor and approved by the board of commissioners, and the chairman of the board was the commissioner of public utilities, grounds, and buildings. *Id.* at 548 n.2.

⁹⁶ *Denver Area*, 518 U.S. at 732.

⁹⁷ *See id.* at 762-63 (describing the management entities of public access channels already in place that are separate from the cable operators).

⁹⁸ *See id.* at 766 (stating the Court's conclusion that the provision was not necessary or appropriately tailored).

⁹⁹ *See Halleck II*, 882 F.3d at 303 (discussing how the cable operator was not involved in the management of the public access channels).

The Second Circuit correctly decided the issue in a narrow decision which stated that only the channels at issue in *Halleck II* were public forums due to the specific characteristics of those channels.¹⁰⁰ By limiting the public forum classification to channels in which the cable operator has no management duties, the Second Circuit avoided running afoul of one of the main points in Justice Thomas's dissent in *Denver Area*: that there is no precedent that recognizes a private entity having the obligation to help create and broadcast the message being spread.¹⁰¹ Justice Thomas stated that the government must traditionally be the one to enforce the openness of the forum in order for the forum to be a public forum.¹⁰² If the public forum is applied the way the Second Circuit and other courts have applied it—namely, only to public access channels managed by public entities or private entities acting as public entities—this tradition of government enforcement will be continued.¹⁰³

CONCLUSION

In February 2018, in *Halleck v. Manhattan Community Access Corp.*, the Second Circuit applied the public forum doctrine to public access channels managed by a private, non-profit corporation acting as a public entity. By avoiding a sweeping proclamation declaring all public access channels to be public forums, the Second Circuit promoted the original intent of the public forum doctrine to prohibit the government from regulating expression in places meant to support the free exchange of ideas. While public access channels may seem out of date, the suppression of speech experienced by the *Halleck* plaintiffs at the hands of a state actor is something that the judiciary must continue to guard against.

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¹⁰⁰ See *id.* at 306 (declining to classify all public access channels as public forums, and instead ruling on the characteristics of the channels at issue).

¹⁰¹ See *Denver Area*, 518 U.S. at 829 (Thomas, J., concurring in part and dissenting in part) (stating the normal practice of cable operators to “shoulder[] the burden of administering and enforcing the openness of the expressive forum” when that role was traditionally carried out by the government).

¹⁰² See *id.* (stating there is no precedent of requiring a private actor to help create and disseminate a message for someone else).

¹⁰³ See *id.* (noting public access channels are often run by the cable operator); *Halleck II*, 882 F.3d at 306 (describing MNN's relation to the municipality).