

Justices Struggle To Classify NYC's Public Access Channel

By Jimmy Hoover

Law360, Washington (February 25, 2019, 10:00 PM EST) -- U.S. Supreme Court justices went back and forth Monday trying to figure out just how much government control over a forum turns a private entity into a "state actor" for free speech purposes in a case involving claims of First Amendment violations against Manhattan's public access television network.

Manhattan Neighborhood Network is trying to dismiss a lawsuit from two individuals claiming the network violated their First Amendment rights by suspending them from airing content on its channels. The Second Circuit held that because MNN is a "constitutional public forum," the network is a state actor and can be sued for free speech violations.

The justices appeared divided on whether the appeals court got it right during Monday's hourlong hearing. Some more liberal members of the court such as Justice Ruth Bader Ginsburg and Justice Elena Kagan seemed to suggest that the government's regulations of the network make MNN an "administrator" of the forum, and thus a state actor under the First Amendment.

Justice Brett Kavanaugh fretted that designating the network as such could mean that other private entities, such as utilities, are also state actors simply because they are subject to extensive regulations by the government.

Justice Stephen Breyer, meanwhile, was candid about his position on the question.

"I'm not taking a side or the other," he told Paul Hughes of Mayer Brown LLP, an attorney for respondents DeeDee Halleck and Jesus Papoleto Melendez, who sued MNN. "I am genuinely uncertain about this, and I brought out the issues to try to get you to focus on them."

It's unclear how broad the implications of the case are. On the one hand, it involves a complicated set of factors that are specific to how the state of New York and New York City regulate public access television.

On the other, the court has never decided whether public access TV networks are state actors, and a new ruling on the issue could potentially implicate other jurisdictions. Meanwhile, amicus briefs filed in the case have warned the court against impeding social media platforms like Twitter and Facebook from moderating their sites. Justice Kavanaugh briefly alluded to those concerns Monday, but they did not feature prominently in the hearing.

MNN was designated as the operator of Manhattan's public access TV channels nearly three decades ago by the city. Under state law, MNN airs content from affiliated producers on a first-come, first-serve basis. Two of the 13 members of its board of directors are chosen by the Manhattan borough president, an elected city official.

Halleck, a filmmaker and activist, and Melendez, a poet and playwright, filed suit after the network took action against them for producing a video that accused the network of excluding local community members. Halleck was suspended from airing content on the network, and Melendez was barred from a leadership program and other MNN services and facilities. The network maintains that Halleck's video contained threatening language, and that Melendez has harassed network employees.

The details of the underlying dispute were not at issue Monday, with the court focusing exclusively on the state actor question.

Justice Breyer and Chief Justice John Roberts homed in on the level of editorial control that the government has over content on MNN's channels, given that state law requires everything to be on a first-come, first-serve basis.

Using a hypothetical example of a segment on New York City hot dogs versus one dealing with the subway, both wondered whether MNN had the authority to ignore the order in which they were submitted and air one before the other. Michael de Leeuw of Cozen O'Connor, an attorney for MNN, said the network could in fact "cluster" a group of hot dog productions "so that people can have a broad view of the merits" of different opinions on the snack, regardless of what was submitted first.

Hughes, representing Halleck and Melendez, said that didn't matter.

"Even if there is a power to schedule and to group things, I don't think that has any bearing on whether or not this is a policy of general access, because, in all public forums, the government can impose neutral time, place, manner restrictions," Hughes said.

Hughes told Law360 in a phone interview later on Monday that he thought the hearing went well.

"I think the court was heavily engaged with the issues ... and we're certainly encouraged by the court's questions," Hughes said.

Cozen's de Leeuw had a similar reaction, saying in a statement, "We appreciated the court's careful consideration of the issues and felt confident in our position. We look forward to learning the decision later this spring."

The justices will now take the case under advisement and are expected to rule sometime before the term ends at the end of June.

MNN is represented by Michael B. de Leeuw, Tamar S. Wise, Stuart A. Shorenstein and Jesse R. Loffler of Cozen O'Connor.

Halleck and Melendez are represented by Paul Hughes, Michael B. Kimberly, Andrew J. Pincus and Charles A. Rothfeld of Mayer Brown LLP, and Brooklyn-based attorney Robert T. Perry, Eugene Volokh of UCLA School of Law and Eugene R. Fidell of Yale Law School's Supreme Court Clinic.

The case is Manhattan Community Access Corp. v. Halleck et al., case number 17-1702, in the U.S. Supreme Court.

--Editing by Nicole Bleier.

All Content © 2003-2019, Portfolio Media, Inc.