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The Supreme Court takes a public-access TV case

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The Supreme Court has so far been slow to grant new cases for review this autumn. But last week the justices added a 44th case to their docket for the 2018-2019 term: *Manhattan Community Access Corp. v. Halleck.* At first glance, the case looks like a minor dispute between a local cable station and a pair of aggrieved videographers whose work was banned from the airwaves. But the conflict goes to the heart of a fraught area of First Amendment law that could have significant implications for media companies—from Twitter to National Public Radio—that curate content on their platforms.

DeeDee Halleck and Jesus Papoleto Melendez are gadflies of the Manhattan Neighbourhood Network (MNN), a public-access cable network of seven cable channels in New York City. Under the auspices of the Manhattan Community Access Corporation, the MNN aims "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". It owes its existence to a New York regulation requiring cable-TV networks with 36 or more channels to provide "at least one full-time activated channel for public-access use". Such a channel must be open to the "public on a first-come, first-served, non-discriminatory basis".

Ms Halleck and Mr Melendez allege than MNN has been neither equitable nor open to their creative energies. Bad blood between the pair and the MNN dates back to December 2011, when Ms Halleck was locked out of a board meeting. Three months later, when Mr Melendez attended another board meeting at the invitation of the executive director, Ms Halleck accompanied him and proceeded to whip out her video camera to record the proceedings. This sparked a row. Iris Morales, an MNN employee, called Ms Halleck a traitor. Later that month, Ms Morales exchanged heated words with Mr Melendez and threw papers in his face. This set up a bit of drama in July 2012, when MNN opened a new building near Mr Melendez's home. Lacking an invitation to the event, he placed himself outside the centre, buttonholing attendees and grousing about having been jilted. The exchanges were filmed by Ms Halleck, who turned the footage into a 25-minute video critical of the MNN called "The 1% visit El Barrio", which aired a few months later on one of the MNN channels. Days after the broadcast, the MNN programming director informed Ms Halleck in writing that the film would never air again; that she was

suspended from airing anything at MNN for a year; and that Mr Melendez was banned permanently.

Ordinarily, privately owned broadcasters are free to air or quash—and hire or fire—whatever and whomever they wish. The First Amendment has a "state actor" requirement that obligates only genuinely public entities to respect individuals' freedom of speech. But Ms Halleck and Mr Melendez, noticing that MNN had a public face, contended that the harsh response amounted to discrimination against their views and violated their rights. At the district court, they had little luck. Looking at Supreme Court precedents, the judge noted that the state of New York appointed only two members of the 13-person MNN board, not a majority as previous cases require for a "state actor" designation. And a public-access channel, the court found, is not a "public forum" for constitutional purposes.

But two of three members of a panel at the Second Circuit Court of Appeals found otherwise. Citing a 1996 Supreme Court case called *Denver Area Educational Telecommunications Consortium v FCC*, Judge Jon Neuman recalled the words of Justice Anthony Kennedy's concurrence: "when a local government contracts to use private property for public expressive activity, it creates a public forum" and functions as a state actor. As an arm of the state, practically speaking, MNN must respect all Manhattanites' freedom of speech. The *Denver Area* majority "suggests without saying it outright", Judge Neuman wrote, that New York City "delegated to MNN the traditionally public function of administering and regulating speech in the public forum" of public-access cable television.

In the eyes of the MNN, this conclusion is hasty and wrong. Drawing on the dissenting opinion from Judge Dennis Jacobs and judgments to the contrary in two other circuit courts, the corporation argues the Second Circuit's ruling is "fundamentally flawed" and untenably sweeps "nearly all public access operators, and potentially many other private entities, into the 'state actor' category". Aside from imposing stringent free-speech mandates on private cable-TV providers, viewing MNN as a state actor could revolutionise the relationship between much larger networks and their users. "Twitter, YouTube, Facebook and Instagram are all popular social media venues used for sharing political opinion", MNN's lawyers note. If the Second Circuit ruling holds, "it is not so clear that these entities are divorced from state action". When several of these platforms kicked conspiracy theorist and radio host Alex Jones off their servers over the summer, Mr Jones cried censorship but had little basis for a lawsuit. If these private companies are suddenly to be considered state actors, he and other blocked users may have a leg to stand on in court.

Ms Halleck and Mr Melendez pooh-pooh this worry, telling the justices that their case has "no effect on whether other kinds of media qualify as public forums". Twitter, Facebook and the rest are "nothing like petitioner MNN", as "[t]he government did not create" them, "impose first-come, first-served access rules" on them or require them to be free of charge. The slippery slope worries are "fanciful", their lawyers write, and the court should ignore the "fairy-tale monsters" imagined by MNN's legal team. For the Cato Institute, a libertarian think-tank, the fear is not so far-fetched. Social media companies, internet service providers and stations like National Public Radio "are directly affected by the uncertainty" that the Second Circuit ruling "wreaks", Cato

writes in an amicus brief. While challenges to these entities have found little traction to date, the Second Circuit decision "gives them new life".

The justices will consider whether to extend or cut off that lifeline when they hear *Halleck* early in 2019. A decision should arrive by the end of June.