Public Access TV Not A State Actor, Cato Tells High Court

Nadia Dreid

December 12, 2018

The Cato Institute is urging the U.S. Supreme Court to overturn a Second Circuit ruling that it says wrongly classifies public access television networks as state actors that are capable of stifling individual First Amendment rights.

The Second Circuit erred when it found public access television to be an extension of state power instead of a private actor with the ability to makeeditorial decisions about its content, the think tank said in an amicus curiae brief Tuesday.

“The majority’s decision erroneously shifts the focus of the ‘state actor’ requirement away from determining whether there is evidence of meaningful state control over a private party’s editorial decisions. Instead, the majority’s reasoning assumes it is the nature of the forum — rather than state control over how that forum decides who speaks or what they say — that determines whether the First Amendment’s restrictions apply,” the brief said.

Public access stations don’t have meaningful state control and as such can’t exercise government power on individuals in violation of their rights, the institute argued, and putting such a liability on private companies would deprive them of the “full right to choose how to participate in the marketplace of ideas."

The appellate court overturned a New York federal court ruling in February when it found that Manhattan Neighborhood Network had violated the First Amendment rights of two of its employees by firing them for producing a segment critical of the network.

The employees sued, arguing that their First Amendment rights had been violated, and the Second Circuit agreed, ruling that public access television was the “electronic version of the public square,” making such networks state actors with a responsibility not to infringe First Amendment rights to free speech.

In reaching the decision, the panel recognized that its ruling split it with precedent set in other appellate courts. “With all respect to those courts that have expressed a view different from ours, we agree with the view expressed by Justices Kennedy and Ginsburg in Denver Area . Public access channels, authorized by Congress to be ‘the video equivalent of the speaker’s soapbox’ and operating under the municipal authority given to MNN in this case, are public forums, and,

in the circumstances of this case, MNN and its employees are subject to First Amendment restrictions," the panel said.

The only dissenter, Justice Dennis Jacobs, warned that the ruling was butting against precedent, writing that the ruling "opens a split with the Sixth Circuit" but "considerably worse, it opens a split with the Second Circuit."

The Cato Institute did not immediately return a request for comment.

The case is Manhattan Community Access Corp. v. Halleck, case number 17-1702 in the Supreme Court of the United States.