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SECOND CIRCUIT REVIEW

Expert Analysis

Recent Decision Extends the Public Forum Doctrine to Public Access Television

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If an activist protests in a forest with nobody around to hear it, does she make a sound? This question goes to the heart of the public forum doctrine, one of the thorniest areas of First Amendment jurisprudence. In numerous opinions dating back to the 1970s, the U.S. Supreme Court has recognized that public forums, such as streets and town squares, serve an important democratic function. The court has therefore held that if government property is a public forum, regulations that burden the use of that property for speech merit heightened scrutiny. For less public types of government property—such as a jail or a military base—the government can have more leeway to impose viewpoint-neutral speech restrictions.

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In practice, the public forum doctrine has proven difficult to execute. While venues like Sixth Avenue or Central Park are obviously public forums, courts have struggled to define the outer limits of the doctrine. Is an auditorium owned by a state university a public forum? What about privately-owned social media platforms like Twitter? Courts have developed a wildly complex set of rules that can at times seem inconsistent. For this reason, scholars have condemned the public forum doctrine as "byzantine," "riven with incoherence," and "virtually impermeable to common sense."

> The Second Circuit's decision sets the stage for further debate over whether a public access channel is a constitutionally protected public forum.

The Second Circuit recently waded into this legal quagmire with *Halleck v. Manhattan Community Access Corporation*, 882 F.3d 300 (2d Cir. 2018). The decision, authored by Judge Jon O. Newman and joined by Judge Raymond J. Lohier Jr., held that several public access television channels in Manhattan qualify as public forums under the First Amendment—even though they are owned by a private corporation. The majority's decision was accompanied by a lengthy dissenting opinion, written by Judge Dennis Jacobs, and is at odds with decisions in the D.C. Circuit and the Southern and Eastern Districts of New York.

Background and History

Public access television is the product of a compromise struck

by Congress in the 1980s between private cable providers and local governments. Congress recognized that cable providers must run their wires over public land to reach subscribers. In compensation for this use of public land, Congress authorized local governments to require that cable providers set aside channel capacity for "public, educational, and governmental access." 47 U.S.C. §541(a)(4)(B).

New York City has taken full advantage of this authority granted by Congress. In Northern Manhattan, for example, the City's franchise agreement with Time Warner requires the cable provider to reserve four public access channels on its airwaves. Under the agreement, these channels are to be administered by an "independent, not-for-profit, membership corporation" designated by the Manhattan Borough President—in this case, an organization called the Manhattan Neighborhood Network.

The plaintiffs in this action were two activists from East Harlem that took issue with the Manhattan Neighborhood Network's mix of programming. In July 2012, they submitted a video for airing on the Network's public access channels. The video, titled "The 1% Visits the Barrio," presented the activists' view that the Network was "more interested in pleasing 'the 1%' than addressing the community programming needs of those living in East Harlem."

The Network aired the activists' 1% video on public access channels in October 2012. Shortly thereafter, however, the Network suspended both activists from airing programming over its channels. According to the Network's programming director, the 1% video violated the Network's content restrictions barring "participation in harassment or aggravated threat toward staff and/or other producers."

In October 2015, the activists sued the Network and its employees, as well as other parties, for depriving them of their rights under the First Amendment. The activists claimed the Network's employees had suspended them in retaliation for their critical video. The defendants, in turn, rejected the activists' allegations and moved to dismiss the lawsuit.

District Court's Opinion

In assessing the activists' claim, District Judge William Pauley III started from the proposition that the First Amendment limits only governmental action. The case therefore hinged on whether the Manhattan Neighborhood Network—a private entity—could somehow be deemed a state actor.

As an initial matter, the district court found that the Network could not simply be characterized as a state actor because it operated under government control. The Manhattan Borough President has authority to appoint only two of the thirteen members of the Network's board—the rest of the board members were independently appointed.

The district court also rejected the argument that the Network is a state actor because New York City has delegated to it authority over a public forum. Although the decision was a "close call," the district court did not believe that a public access channel qualifies as a public forum under the First Amendment. It explained that "the ownership and operation of an entertainment facility are not powers traditionally reserved to the State." Therefore, the Network's control of public access channels did not render it an arm of the government.

Second Circuit's Ruling

The Second Circuit reversed the district court's decision. It found that the Network's four public access channels are public forums and that the activists had alleged facts sufficient to show that the Network and its employees were state actors subject to the First Amendment.

The court began its analysis by reviewing the Supreme Court's decision in *Denver Area Educ.*

Telecommunications Consortium v. F.C.C., 518 U.S. 727 (1996). There, the Supreme Court assessed the constitutionality of several statutes governing cable television, one of which applied to public access channels. The case proved to be particularly divisive, generating six opinions spanning 112 pages. Pertinent to the present case, five Justices expressed differing views on whether public access channels were public forums. Justice Anthony Kennedy, with whom Justice Ruth Bader Ginsburg concurred, argued that public access channels are public forums. He wrote that a public forum is created "when a local government contracts to use private property for public expressive activity." By contrast, Justice Clarence Thomas, with whom Chief Justice William Rehnquist and Justice Antonin Scalia concurred, contended that public access channels are *not* public forums because they are privately owned. Finally, Justice Stephen Breyer, together with Justices John Paul Stevens and Sandra Day O'Connor, explicitly declined to express a view at all.

After assessing these opinions, the Second Circuit majority sided with Justices Kennedy and Ginsburg. "A public access channel," the court declared, "is the electronic version of the public square." And because the Manhattan Borough President had designated the Manhattan Neighborhood Network to run the City's public access channels, the Network and its employees had exercised the type of authority subject to the First Amendment.

In reaching this decision, the Second Circuit acknowledged that it was setting itself at odds with a number of other courts, including the D.C. Circuit and several judges in the Southern and Eastern Districts of New York. The court took great pains, however, to cabin its decision to "the circumstances of this case." The decision should not be read, the court cautioned, as "determining whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square."

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Judge Jacobs responded to the majority's opinion with a spirited dissent. Agreeing with the district court, he argued that the Network could not be a state actor because it did not perform a government function. Indeed, "it is fortunate for our liberty that it is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." Many other courts, Judge Jacobs contended, had taken this position, including the Sixth Circuit, the D.C. Circuit, and even the Second Circuit itself. The First Amendment therefore offered no protection to the activists in the present case.

Conclusion

The Second Circuit's decision sets the stage for further debate over whether a public access channel is a constitutionally protected public forum. As the court acknowledged, its holding relies on a fractured Supreme Court decision. And while the court sought to rule narrowly, its decision nevertheless creates a split with the D.C. Circuit. Ultimately, the status of public access channels under the First Amendment may remain in limbo until the Supreme Court weighs in again decisively.