



Against the background of lawsuits and debate about the role of communications service providers in moderating speech on their platforms, the U.S. Supreme Court has weighed in, affirming that private entities that host forums for speech are not state actors subject to constitutional requirements.

The Decision In a 5-4 decision by Justice Kavanaugh, the Court held in [Manhattan Community Access Corp. v. Halleck, 587 U.S. ___ \(2019\)](#) that a private, nonprofit corporation operating a public-access TV channel is not a state actor subject to the First Amendment. Producers of public access programming had claimed the channel was a state actor that violated their First Amendment rights after it suspended them from its services due to their films' content. The Court disagreed. **Exclusive Public Function Analysis** As the Court recognized, there are only few instances in which a private entity can be a state actor:

- First, the private entity can be a state actor where it performs a traditional, exclusive public function, that it, one that has been traditionally and exclusively performed by the government. The Court noted there are "very few" (e.g., running elections, operating a company town). Op. at 6–7.
- Second, a private entity can be a state actor if the government outsources a constitutional obligation to the entity. But if the government is not required to perform the function at issue, a private entity cannot become a state actor.

The Court found there was no state action in this case because (1) the government has not traditionally and exclusively operated public access channels, and (2) it is not obligated to operate these channels. **Implications of The Decision** The Court's reasoning suggests that private entities operating forums for speech (not only public access TV channels) are not transformed into state actors. First, hosting a forum is not a traditional, exclusive public function. Like public access channels, forums for speech have been operated by public and private entities. Second, the government is not required to operate these forums. So it does not outsource any constitutional obligation to a private entity that operates a forum. The logical outgrowth is that private entities may moderate speech in their forums without implicating the First Amendment. There are other cases concerning the issue (discussed [here](#), [here](#), and [here](#), e.g.). But the U.S. Supreme Court had not weighed in until *Halleck*. And its decision should foreclose the idea that mere association between private entities and the government is state action. A nonprofit corporation required by law to operate a public access channel is not a state actor. Therefore, online platforms with even more tangential relationships with government should not be either. Were the opposite to be true, service providers' editorial discretion would effectively cease to exist. As the Court reinforced, this would "create a court-made law wholly disregarding the constitutional basis on which private ownership rests in this country." Op. at 10.

Authors



[Ryan Mrazik](#)

Partner

RMrazik@perkinscoie.com [206.359.8098](tel:206.359.8098)



[Ariel B. Glickman](#)

Counsel

AGlickman@perkinscoie.com [202.654.6372](tel:202.654.6372)



Natasha Amlani

Associate

NAmlani@perkinscoie.com [310.788.3347](tel:310.788.3347)

Explore more in

[Consumer Protection](#)

Blog series

Consumer Protection Review

Consumer Protection Review helps businesses that market and sell to consumers navigate federal and state legal issues related to advertising, privacy, promotions, products liability, government investigations, unfair competition, class actions and general consumer protection.

[View the blog](#)