# SUPREME COURT OF THE UNITED STATES

---

No. 96–779

---

ARKANSAS EDUCATIONAL TELEVISION COMMISSION, PETITIONER *v.* RALPH P. FORBES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 18, 1998]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

The Court has decided that a state-owned television network has no "constitutional obligation to allow every candidate access to" political debates that it sponsors. *Ante,* at 1. I do not challenge that decision. The judgment of the Court of Appeals should nevertheless be affirmed. The official action that led to the exclusion of respondent Forbes from a debate with the two major-party candidates for election to one of Arkansas' four seats in Congress does not adhere to well-settled constitutional principles. The ad hoc decision of the staff of the Arkansas Educational Television Commission (AETC) raises precisely the concerns addressed by "the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 150–

151 (1969).

In its discussion of the facts, the Court barely mentions the standardless character of the decision to exclude Forbes from the debate. In its discussion of the law, the Court understates the constitutional importance of the distinction between state ownership and private ownership of broadcast facilities. I shall therefore first add a few words about the record in this case and the history of regulation of the broadcast media, before explaining why I believe the judgment should be affirmed.

I

Two months before Forbes was officially certified as an independent candidate qualified to appear on the ballot under Arkansas law,[1] the AETC staff had already concluded that he "should not be invited" to participate in the televised debates because he was "not a serious candidate as determined by the voters of Arkansas."[2] He had, however, been a serious contender for the Republican nomination for Lieutenant Governor in 1986 and again in 1990. Although he was defeated in a run-off election, in the three-way primary race conducted in 1990– just two years before the AETC staff decision– he had received 46.88% of the statewide vote and had carried 15 of the 16 counties within the Third Congressional District by absolute majorities. Nevertheless, the staff concluded that Forbes did not have "strong popular support." Record, Affidavit of Bill Simmons ¶5.[3]

---

[1] See Ark. Code Ann. §7–7–103(c)(1) (1992).

[2] Record, Letter to Carole Adornetto from Amy Oliver Barnes dated June 19, 1992, attached as Exh. 2 to Affidavit of Amy Oliver Barnes.

[3] Simmons, a journalist working with the AETC staff on the debates, stated that "[a]t the time this decision [to invite only candidates with strong popular support] was made . . . , there were no third party or non-party candidates to evaluate as to the likely extent of their popular support." Record, Affidavit of Bill Simmons ¶5. Presumably Simmons

Given the fact that the Republican winner in the Third Congressional District race in 1992 received only 50.22% of the vote and the Democrat received 47.20%,[4] it would have been necessary for Forbes, who had made a strong showing in recent Republican primaries, to divert only a handful of votes from the Republican candidate to cause his defeat. Thus, even though the AETC staff may have correctly concluded that Forbes was "not a serious candidate," their decision to exclude him from the debate may have determined the outcome of the election in the Third District.

If a comparable decision were made today by a privately owned network, it would be subject to scrutiny under the Federal Election Campaign Act[5] unless the network used "pre-established objective criteria to determine which candidates may participate in [the] debate." 11 CFR §110.13(c) (1997). No such criteria governed AETC's refusal to permit Forbes to participate in the debate. Indeed, whether that refusal was based on a judgment about "newsworthiness"– as AETC has argued in this Court– or a judgment about "political viability"– as it argued in the Court of Appeals– the facts in the record presumably would have provided an adequate basis either for a decision to include Forbes in the Third District debate or a decision to exclude him, and might even have required a cancellation of two of the other debates.[6]

---

meant that there was no other ballot-qualified candidate, because an AETC staff member, Amy Oliver, represented that there was consideration about whether to invite Forbes before he qualified as a candidate. See text accompanying n. 2, *infra*.

[4] See App. 172.

[5] See 2 U. S. C. §441b(a); see also *Perot* v. *FEC*, 97 F. 3d 553, 556 (CADC 1996), cert. denied *sub nom*. *Hagelin* v. *FEC*, 520 U. S. ___ (1997).

[6] Although the contest between the major-party candidates in the Third District was a relatively close one, in two of the other three dis-

The apparent flexibility of AETC's purported standard suggests the extent to which the staff had nearly limitless discretion to exclude Forbes from the debate based on ad hoc justifications. Thus, the Court of Appeals correctly concluded that the staff's appraisal of "political viability" was "so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment." *Forbes* v. *Arkansas Educational Television Communication Network Foundation*, 93 F. 3d 497, 505 (CA8 1996).

II

AETC is a state agency whose actions "are fairly attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees." *Forbes* v. *Arkansas Educational Television Communication Network Foundation*, 22 F. 3d 1423, 1428 (CA8), cert. denied, 513 U. S. 995 (1994), 514 U. S. 1110 (1995). The AETC staff members therefore "were not ordinary journalists: they were employees of government." 93 F. 3d, at 505. The Court implicitly acknowledges these facts by subjecting the decision to exclude Forbes to constitutional analysis. Yet the Court seriously underestimates the importance of the difference between private and pub-

---

tricts in which both major-party candidates had been invited to debate, it was clear that one of them had virtually no chance of winning the election. Democrat Blanche Lambert's resounding victory over Republican Terry Hayes in the First Congressional District illustrates this point: Lambert received 69.8% of the vote compared with Hays' 30.2%. R. Scammon & A. McGillivray, America Votes 20: A Handbook of Contemporary American Election Statistics 99 (1993). Similarly, in the Second District, Democrat Ray Thornton, the incumbent, defeated Republican Dennis Scott and won with 74.2% of the vote. *Ibid.* Note that Scott raised only $6,000, which was less than Forbes raised; nevertheless, Scott was invited to participate in a debate while Forbes was not. See App. 133–134, 175.

lic ownership of broadcast facilities, despite the fact that Congress and this Court have repeatedly recognized that difference.

In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94 (1973), the Court held that a licensee is neither a common carrier, *id.*, at 107–109, nor a public forum that must accommodate "'the right of every individual to speak, write, or publish,'" *id.*, at 101 (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 388 (1969)). Speaking for a plurality, Chief Justice Burger expressed the opinion that the First Amendment imposes no constraint on the private network's journalistic freedom. He supported that view by noting that when Congress confronted the advent of radio in the 1920's, it "was faced with a fundamental choice between total Government ownership and control of the new medium– the choice of most other countries– or some other alternative." 412 U. S., at 116.[7] Congress chose a system of private broadcasters licensed and regulated by the Government,

---

[7] Interestingly, many countries that formerly relied upon state control of broadcast entities appear to be moving in the direction of deregulation and private ownership of such entities. See, *e.g.*, Bughin & Griekspoor, A New Era for European TV, 3 McKinsey Q. 90, 92–93 (1997) ("Most of Western Europe's public television broadcasters began to lose their grip on the market in the mid-1980s. Only Switzerland, Austria, and Ireland continue to operate state television monopolies . . . . In Europe as a whole (including Eastern Europe, where television remains largely state controlled), the number of private broadcasters holding market-leading positions nearly doubled in the first half of this decade."); Rohwedder, Central Europe's Broadcasters Square Off, Wall Street Journal Europe 4 (May 15, 1995) ("Central Europe's government-run television channels, unchallenged media masters in the days of communist control, are coming under increasingly aggressive attack from upstart private broadcasters"); Lange & Woldt, European Interest in the American Experience in Self-Regulation, 13 Cardozo Arts & Ent. L. J. 657, 658 (1995) ("Over the last ten years, in Germany and many other European countries, public broadcasting has been weakened by competition from private television channels").

partly because of our traditional respect for private enterprise, but more importantly because public ownership created unacceptable risks of governmental censorship and use of the media for propaganda. "Congress appears to have concluded . . . that of these two choices— private or official censorship— Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." *Id.*, at 105.[8]

While noncommercial, educational stations generally have exercised the same journalistic independence as commercial networks, in 1981 Congress enacted a statute forbidding stations that received a federal subsidy from engaging in "editorializing."[9] Relying primarily on cases involving the rights of commercial entities, a bare majority of this Court held the restriction invalid. *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984). Responding to the dissenting view that "the interest in keeping the Federal Government out of the propaganda arena" justified the restriction, *id.*, at 415 (STEVENS, J.), the majority emphasized the broad coverage of the statute and concluded that it "impermissibly sweeps within its prohibition a wide range of speech by wholly private stations on topics that . . . have nothing whatever to do with federal, state, or

---

[8]The Court considered then-Secretary of Commerce Herbert Hoover's statement to a House committee expressing concern about government involvement in broadcasting:

"'We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.'" 412 U. S., at 104 (quoting Hearings on H. R. 7357 before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess., 8 (1924)).

[9]Public Broadcasting Amendments of 1981, Pub. L. 97–35, 95 Stat. 730, amending §399 of the Public Broadcasting Act of 1967, Pub. L. 90–129, 81 Stat. 365, 47 U. S. C. §390 *et seq.*

local government." *Id.*, at 395. The Court noted that Congress had considered and rejected a ban that would have applied only to stations operated by state or local governmental entities, and reserved decision on the constitutionality of such a limited ban. See *id.*, at 394, n. 24.

The *League of Women Voters* case implicated the right of "wholly private stations" to express their own views on a wide range of topics that "have nothing whatever to do with . . . government." *Id.*, at 395. The case before us today involves only the right of a state-owned network to regulate speech that plays a central role in democratic government. Because AETC is owned by the State, deference to its interest in making ad hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not.

III

The Court recognizes that the debates sponsored by AETC were "by design a forum for political speech by the candidates." *Ante*, at 8. The Court also acknowledges the central importance of candidate debates in the electoral process. See *ibid.* Thus, there is no need to review our cases expounding on the public forum doctrine to conclude that the First Amendment will not tolerate a state agency's arbitrary exclusion from a debate forum based, for example, on an expectation that the speaker might be critical of the Governor, or might hold unpopular views about abortion or the death penalty. Indeed, the Court so holds today.[10]

---

[10]The Court correctly rejects the extreme position that the First Amendment simply has no application to a candidate's claim that he or she should be permitted to participate in a televised debate. See Brief for FCC et al. as *Amici Curiae* 14 ("The First Amendment does not constrain the editorial choices of state-entity public broadcasters licensed to operate under the Communications Act"); see also Brief for

It seems equally clear, however, that the First Amendment will not tolerate arbitrary definitions of the scope of the forum. We have recognized that "[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). It follows, of course, that a State's failure to set any meaningful boundaries at all cannot insulate the State's action from First Amendment challenge. The dispositive issue in this case, then, is not whether AETC created a designated public forum or a nonpublic forum, as the Court concludes, but whether AETC defined the contours of the debate forum with sufficient specificity to justify the exclusion of a ballot-qualified candidate.

AETC asks that we reject Forbes' constitutional claim on the basis of entirely subjective, ad hoc judgments about the dimensions of its forum.[11] The First Amendment demands more, however, when a state government effectively wields the power to eliminate a political candidate from all consideration by the voters. All stations must act as editors, see *ante*, at 5–6, and when state-owned stations participate in the broadcasting arena, their editorial decisions may impact the constitutional interests of individual speakers.[12] A state-owned broadcaster need not plan, sponsor, and conduct political debates, however. When it chooses to do so, the First Amendment imposes important limitations on its control over access to the debate forum.

AETC's control was comparable to that of a local government official authorized to issue permits to use public facilities for expressive activities. In cases concerning

---

State of California et al. as *Amici Curiae* 4 ("In its role as speaker, rather than mere forum provider, the state actor is not restricted by speaker-inclusive and viewpoint-neutral rules").

[11] See *supra*, at 3–4.

[12] See n. 17, *infra*.

access to a traditional public forum, we have found an analogy between the power to issue permits and the censorial power to impose a prior restraint on speech. Thus, in our review of an ordinance requiring a permit to participate in a parade on city streets, we explained that the ordinance, as written, "fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth*, 394 U. S., at 150–151.

We recently reaffirmed this approach when considering the constitutionality of an assembly and parade ordinance that authorized a county official to exercise discretion in setting the amount of the permit fee. In *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992), relying on *Shuttlesworth* and similar cases,[13] we described the breadth of the administrator's discretion thusly:

> "There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled

---

[13]After citing *Shuttlesworth*, we explained: "The reasoning is simple: If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940), by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 553 (1975)." 505 U. S., at 131 (citations omitted).

discretion in a government official." 505 U. S., at 133 (footnotes omitted).

Perhaps the discretion of the AETC staff in controlling access to the 1992 candidate debates was not quite as unbridled as that of the Forsyth County administrator. Nevertheless, it was surely broad enough to raise the concerns that controlled our decision in that case. No written criteria cabined the discretion of the AETC staff. Their subjective judgment about a candidate's "viability" or "newsworthiness" allowed them wide latitude either to permit or to exclude a third participant in any debate.[14] Moreover, in exercising that judgment they were free to rely on factors that arguably should favor inclusion as justifications for exclusion. Thus, the fact that Forbes had little financial support was considered as evidence of his lack of viability when that factor might have provided an independent reason for allowing him to share a free forum with wealthier candidates.[15]

The televised debate forum at issue in this case may not squarely fit within our public forum analysis,[16] but its

---

[14] It is particularly troubling that AETC excluded the only independent candidate but invited all the major-party candidates to participate in the planned debates, regardless of their chances of electoral success. See n. 6, *supra*. As this Court has recognized, "political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson* v. *Celebrezze*, 460 U. S. 780, 794 (1983) (citing *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 186 (1979)).

[15] Lack of substantial financial support apparently was not a factor in the decision to invite a major-party candidate with even less financial support than Forbes. See n. 6, *supra*.

[16] Indeed, a plurality of the Court recently has expressed reluctance about applying public forum analysis to new and changing contexts. See *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 741, 749 (1996) (plurality opinion) ("[I]t is not at all clear that the public forum doctrine should be imported wholesale into the

importance cannot be denied. Given the special character of political speech, particularly during campaigns for elected office, the debate forum implicates constitutional concerns of the highest order, as the majority acknowledges. *Ante*, at 8. Indeed, the planning and management of political debates by state-owned broadcasters raise serious constitutional concerns that are seldom replicated when state-owned television networks engage in other types of programming.[17] We have recognized that "speech concerning public affairs is . . . the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). The First Amendment therefore "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971). Surely the Constitution demands at least as much from the Government when it takes action that necessarily impacts democratic elections as when local officials issue parade permits.

The reasons that support the need for narrow, objective, and definite standards to guide licensing decisions apply directly to the wholly subjective access decisions made by

---

area of common carriage regulation").

[17] The Court observes that "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming." *Ante*, at 7. A rule, such as the one promulgated by the FEC, that requires the use of pre-established, objective criteria to identify the candidates who may participate leaves all other programming decisions unaffected. This is not to say that all other programming decisions made by state-owned television networks are immune from attack on constitutional grounds. As long as the State is not itself a "speaker," its decisions, like employment decisions by state agencies and unlike decisions by private actors, must respect the commands of the First Amendment. It is decades of settled jurisprudence that require judicial review of state action that is challenged on First Amendment grounds. See, *e.g.*, *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995).

the staff of AETC.[18] The importance of avoiding arbitrary or viewpoint-based exclusions from political debates militates strongly in favor of requiring the controlling state agency to use (and adhere to) pre-established, objective criteria to determine who among qualified candidates may participate. When the demand for speaking facilities exceeds supply, the State must "ration or allocate the scarce resources on some acceptable neutral principle." *Rosenberger*, 515 U. S., at 835. A constitutional duty to use objective standards– *i.e.*, "neutral principles"– for determining whether and when to adjust a debate format would impose only a modest requirement that would fall far short of a duty to grant every multiple-party request.[19] Such standards would also have the benefit of providing the public with some assurance that state-owned broadcasters cannot select debate participants on arbitrary grounds.[20]

---

[18] Ironically, it is the standardless character of the decision to exclude Forbes that provides the basis for the Court's conclusion that the debates were a nonpublic forum rather than a limited public forum. On page 11 of its opinion, *ante*, the Court explains that "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." If, as AETC claims, it did invite either the entire class of "viable" candidates, or the entire class of "newsworthy" candidates, under the Court's reasoning, it created a designated public forum.

[19] The Court expresses concern that as a direct result of the Court of Appeals' holding that all ballot-qualified candidates have a right to participate in every debate, a state-owned network cancelled a 1996 Nebraska debate. *Ante*, at 14. If the Nebraska station had realized that it could have satisfied its First Amendment obligations simply by setting out participation standards before the debate, however, it seems quite unlikely that it would have chosen instead to cancel the debate.

[20] The fact that AETC and other state-owned networks have adopted policy statements emphasizing the importance of shielding programming decisions from political influence, see *ante*, at 2, confirms the significance of the risk that would be minimized by the adoption of objective criteria.

Like the Court, I do not endorse the view of the Court of Appeals that all candidates who qualify for a position on the ballot are necessarily entitled to access to any state-sponsored debate. I am convinced, however, that the constitutional imperatives that motivated our decisions in cases like *Shuttlesworth* command that access to political debates planned and managed by state-owned entities be governed by pre-established, objective criteria. Requiring government employees to set out objective criteria by which they choose which candidates will benefit from the significant media exposure that results from state-sponsored political debates would alleviate some of the risk inherent in allowing government agencies– rather than private entities– to stage candidate debates.

Accordingly, I would affirm the judgment of the Court of Appeals.