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 KENNEDY delivered the opinion of the Court.

A state-owned public television broadcaster sponsored a candidate debate from which it excluded an independent candidate with little popular support. The issue before us is whether, by reason of its state ownership, the station had a constitutional obligation to allow every candidate access to the debate. We conclude that, unlike most other public television programs, the candidate debate was subject to constitutional constraints applicable to nonpublic fora under our forum precedents. Even so, the broadcaster's decision to exclude the candidate was a reasonable, viewpoint-neutral exercise of journalistic discretion.

I

Petitioner, the Arkansas Educational Television Commission (AETC), is an Arkansas state agency owning and operating a network of five noncommercial television stations (Arkansas Educational Television Network or AETN). The eight members of AETC are appointed by the Governor for 8-year terms and are removable only for good

cause. Ark. Code Ann. §§6–3–102(a)(1), (b)(1) (Supp. 1997), §25–16–804(b)(1) (1996). AETC members are barred from holding any other state or federal office, with the exception of teaching positions. Ark. Code Ann. §6–3–102(a)(3) (Supp. 1997). To insulate its programming decisions from political pressure, AETC employs an Executive Director and professional staff who exercise broad editorial discretion in planning the network's programming. AETC has also adopted the Statement of Principles of Editorial Integrity in Public Broadcasting, which counsel adherence to "generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters." App. to Pet. for Cert. 82a.

In the spring of 1992, AETC staff began planning a series of debates between candidates for federal office in the November 1992 elections. AETC decided to televise a total of five debates, scheduling one for the Senate election and one for each of the four congressional elections in Arkansas. Working in close consultation with Bill Simmons, Arkansas Bureau Chief for the Associated Press, AETC staff developed a debate format allowing about 53 minutes during each 1-hour debate for questions to and answers by the candidates. Given the time constraint, the staff and Simmons "decided to limit participation in the debates to the major party candidates or any other candidate who had strong popular support." Record, Affidavit of Bill Simmons ¶5.

On June 17, 1992, AETC invited the Republican and Democratic candidates for Arkansas' Third Congressional District to participate in the AETC debate for that seat. Two months later, after obtaining the 2,000 signatures required by Arkansas law, see Ark. Code Ann. §7–7–103(c)(1) (1993), respondent Ralph Forbes was certified as an independent candidate qualified to appear on the ballot for the seat. Forbes was a perennial candidate who had

sought, without success, a number of elected offices in Arkansas. On August 24, 1992, he wrote to AETC requesting permission to participate in the debate for his district, scheduled for October 22, 1992. On September 4, AETC Executive Director Susan Howarth denied Forbes' request, explaining that AETC had "made a bona fide journalistic judgement that our viewers would be best served by limiting the debate" to the candidates already invited. App. 61.

On October 19, 1992, Forbes filed suit against AETC, seeking injunctive and declaratory relief as well as damages. Forbes claimed he was entitled to participate in the debate under both the First Amendment and 47 U. S. C. §315, which affords political candidates a limited right of access to television air time. Forbes requested a preliminary injunction mandating his inclusion in the debate. The District Court denied the request, as did the United States Court of Appeals for the Eighth Circuit. The District Court later dismissed Forbes' action for failure to state a claim.

Sitting en banc, the Court of Appeals affirmed the dismissal of Forbes' statutory claim, holding that he had failed to exhaust his administrative remedies. The court reversed, however, the dismissal of Forbes' First Amendment claim. Observing that AETC is a state actor, the court held Forbes had "a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have [had] a legitimate reason to exclude him strong enough to survive First Amendment scrutiny." *Forbes* v. *Arkansas Ed. Television Network Foundation,* 22 F. 3d 1423, 1428 (CA8), cert. denied, 513 U. S. 995 (1994), 514 U. S. 1110 (1995). Because AETC had not yet filed an answer to Forbes' complaint, it had not given any reason for excluding him from the debate, and the Court of Appeals remanded the action for further proceedings.

On remand, the District Court found as a matter of law

that the debate was a nonpublic forum, and the issue became whether Forbes' views were the reason for his exclusion. At trial, AETC professional staff testified Forbes was excluded because he lacked any campaign organization, had not generated appreciable voter support, and was not regarded as a serious candidate by the press covering the election. The jury made express findings that AETC's decision to exclude Forbes had not been influenced by political pressure or disagreement with his views. The District Court entered judgment for AETC.

The Court of Appeals again reversed. The court acknowledged that AETC's decision to exclude Forbes "was made in good faith" and was "exactly the kind of journalistic judgment routinely made by newspeople." 93 F. 3d 497, 505 (CA8 1996). The court asserted, nevertheless, that AETC had "opened its facilities to a particular group– candidates running for the Third District Congressional seat." *Id.*, at 504. AETC's action, the court held, made the debate a public forum, to which all candidates "legally qualified to appear on the ballot" had a presumptive right of access. *Ibid.* Applying strict scrutiny, the court determined that AETC's assessment of Forbes' "political viability" was neither a "compelling nor [a] narrowly tailored" reason for excluding him from the debate. *Id.*, at 504–505.

A conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in *Chandler* v. *Georgia Public Telecommunications Comm'n*, 917 F. 2d 486 (1990), cert. denied, 502 U. S. 816 (1991), together with the manifest importance of the case, led us to grant certiorari. 520 U. S. ___ (1997). We now reverse.

II

Forbes has long since abandoned his statutory claims under 47 U. S. C. §315, and so the issue is whether his exclusion from the debate was consistent with the First Amendment. The Court of Appeals held it was not,

applying our public forum precedents. Appearing as *amicus curiae* in support of petitioners, the Solicitor General argues that our forum precedents should be of little relevance in the context of television broadcasting. At the outset, then, it is instructive to ask whether public forum principles apply to the case at all.

Having first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting. In the case of streets and parks, the open access and viewpoint neutrality commanded by the doctrine is "compatible with the intended purpose of the property." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 49 (1983). So too was the requirement of viewpoint neutrality compatible with the university's funding of student publications in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). In the case of television broadcasting, however, broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.

Congress has rejected the argument that "broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 105 (1973). Instead, television broadcasters enjoy the "widest journalistic freedom" consistent with their public responsibilities. *Id.*, at 110; *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 378 (1984). Among the broadcaster's responsibilities is the duty to schedule programming that serves the "public interest, convenience, and necessity." 47 U. S. C. §309(a). Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial

discretion in the selection and presentation of their programming.

As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be particularly vulnerable to claims of this type because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint-based. To comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints. "That editors– newspaper or broadcast– can and do abuse this power is beyond doubt," *Columbia Broadcasting System, Inc.*, 412 U. S., at 124; but "[c]alculated risks of abuse are taken in order to preserve higher values." *Id.*, at 125. Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.

When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity. Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 636 (1994) ("Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats'") (quoting *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986)). Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communi-

cative acts. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 570 (1995) (a speaker need not "generate, as an original matter, each item featured in the communication").

Claims of access under our public forum precedents could obstruct the legitimate purposes of television broadcasters. Were the doctrine given sweeping application in this context, courts "would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired." *Columbia Broadcasting System, Inc., supra,* at 127. "The result would be a further erosion of the journalistic discretion of broadcasters," transferring "control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals" who bring suit under our forum precedents. 412 U. S., at 124. In effect, we would "exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators." *Id.*, at 125.

In the absence of any congressional command to "[r]egimen[t] broadcasters" in this manner, *id.*, at 127, we are disinclined to do so through doctrines of our own design. This is not to say the First Amendment would bar the legislative imposition of neutral rules for access to public broadcasting. Instead, we say that, in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming.

Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule. For two reasons, a candidate debate like the one at issue here is different from other programming. First, unlike AETC's

other broadcasts, the debate was by design a forum for political speech by the candidates. Consistent with the long tradition of candidate debates, the implicit representation of the broadcaster was that the views expressed were those of the candidates, not its own. The very purpose of the debate was to allow the candidates to express their views with minimal intrusion by the broadcaster. In this respect the debate differed even from a political talk show, whose host can express partisan views and then limit the discussion to those ideas.

Second, in our tradition, candidate debates are of exceptional significance in the electoral process. "[I]t is of particular importance that candidates have the opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *CBS, Inc.* v. *FCC,* 453 U. S. 367, 396 (1981) (internal quotation marks omitted). Deliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates. A majority of the population cites television as its primary source of election information, and debates are regarded as the "only occasion during a campaign when the attention of a large portion of the American public is focused on the election, as well as the only campaign information format which potentially offers sufficient time to explore issues and policies in depth in a neutral forum." Congressional Research Service, Campaign Debates in Presidential General Elections, summ. (June 15, 1993).

As we later discuss, in many cases it is not feasible for the broadcaster to allow unlimited access to a candidate debate. Yet the requirement of neutrality remains; a broadcaster cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's

views. Viewpoint discrimination in this context would present not a "[c]alculated ris[k]," *Columbia Broadcasting System, Inc., supra,* at 125, but an inevitability of skewing the electoral dialogue.

The special characteristics of candidate debates support the conclusion that the AETC debate was a forum of some type. The question of what type must be answered by reference to our public forum precedents, to which we now turn.

III

Forbes argues, and the Court of Appeals held, that the debate was a public forum to which he had a First Amendment right of access. Under our precedents, however, the debate was a nonpublic forum, from which AETC could exclude Forbes in the reasonable, viewpoint-neutral exercise of its journalistic discretion.

A

For our purposes, it will suffice to employ the categories of speech fora already established and discussed in our cases. "[T]he Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802 (1985). Traditional public fora are defined by the objective characteristics of the property, such as whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate." *Perry Ed. Assn.*, 460 U. S., at 45. The government can exclude a speaker from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius, supra,* at 800.

Designated public fora, in contrast, are created by purposeful governmental action. "The government does not create a [designated] public forum by inaction or by per-

mitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." 473 U. S., at 802; accord, *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678 (1992) *(ISKCON)* (designated public forum is "property that the State has opened for expressive activity by all or part of the public"). Hence "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U. S., at 802. If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny. *Ibid.*; *United States* v. *Kokinda*, 497 U. S. 720, 726–727 (1990) (plurality opinion of O'CONNOR, J.).

Other government properties are either nonpublic fora or not fora at all. *ISKCON, supra,* at 678–679. The government can restrict access to a nonpublic forum "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius, supra,* at 800 (internal quotation marks omitted).

In summary, traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers. The government is free to open additional properties for expressive use by the general public or by a particular class of speakers, thereby creating designated public fora. Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all.

B

The parties agree the AETC debate was not a traditional public forum. The Court has rejected the view that traditional public forum status extends beyond its historic confines, see *ISKCON*, *supra,* at 680–681; and even had a more expansive conception of traditional public fora been adopted, see, *e.g.*, 473 U. S., at 698–699 (KENNEDY, J., concurring in judgments), the almost unfettered access of a traditional public forum would be incompatible with the programming dictates a television broadcaster must follow. See *supra*, at 5–7. The issue, then, is whether the debate was a designated public forum or a nonpublic forum.

Under our precedents, the AETC debate was not a designated public forum. To create a forum of this type, the government must intend to make the property "generally available," *Widmar* v. *Vincent,* 454 U. S. 263, 264 (1981), to a class of speakers. Accord, *Cornelius*, *supra*, at 802. In *Widmar,* for example, a state university created a public forum for registered student groups by implementing a policy that expressly made its meeting facilities "generally open" to such groups. 454 U. S., at 267; accord, *Perry*, *supra*, at 45 (designated public forum is "generally open"). 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. In *Perry,* for example, the Court held a school district's internal mail system was not a designated public forum even though selected speakers were able to gain access to it. The basis for the holding in *Perry* was explained by the Court in *Cornelius:*

> "In contrast to the general access policy in *Widmar,* school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before ac-

> cess to the system to communicate with teachers was granted." 473 U. S., at 803.

And in *Cornelius* itself, the Court held the Combined Federal Campaign (CFC) charity drive was not a designated public forum because "[t]he Government's consistent policy ha[d] been to limit participation in the CFC to 'appropriate' [*i.e.*, charitable rather than political] voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials." *Id.*, at 804.

These cases illustrate the distinction between "general access," *id.*, at 803, which indicates the property is a designated public forum, and "selective access," *id.*, at 805, which indicates the property is a nonpublic forum. On one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers, as the university made its facilities generally available to student groups in *Widmar*. On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission," 473 U. S., at 804, to use it. For instance, the Federal Government did not create a designated public forum in *Cornelius* when it reserved eligibility for participation in the CFC drive to charitable agencies, and then made individual, non-ministerial judgments as to which of the eligible agencies would participate. *Ibid.*

The *Cornelius* distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of

traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Here, the debate did not have an open-microphone format. Contrary to the assertion of the Court of Appeals, AETC did not make its debate generally available to candidates for Arkansas' Third Congressional District seat. Instead, just as the Federal Government in *Cornelius* reserved eligibility for participation in the CFC program to certain classes of voluntary agencies, AETC reserved eligibility for participation in the debate to candidates for the Third Congressional District seat (as opposed to some other seat). At that point, just as the Government in *Cornelius* made agency-by-agency determinations as to which of the eligible agencies would participate in the CFC, AETC made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate. "Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Cornelius, supra,* at 805. Thus the debate was a nonpublic forum.

In addition to being a misapplication of our precedents, the Court of Appeals' holding would result in less speech, not more. In ruling that the debate was a public forum open to all ballot-qualified candidates, 93 F. 3d, at 504, the Court of Appeals would place a severe burden upon public broadcasters who air candidates' views. In each of the 1988, 1992, and 1996 Presidential elections, for example, no fewer than 22 candidates appeared on the ballot in at least one State. See Twentieth Century Fund Task Force on Presidential Debates, Let America Decide 148 (1995); Federal Election Commission, Federal Elections 92, p. 9 (1993); Federal Election Commission, Federal Elections 96, p. 11 (1997). In the 1996 congressional elections, it was common for 6 to 11 candidates to qualify for the ballot for a particular seat. See 1996 Election Results, 54 Con-

gressional Quarterly Weekly Report 3250–3257 (1996). In the 1993 New Jersey gubernatorial election, to illustrate further, sample ballot mailings included the written statements of 19 candidates. See N. Y. Times, Sept. 11, 1993, section 1, p. 26, col. 5. On logistical grounds alone, a public television editor might, with reason, decide that the inclusion of all ballot-qualified candidates would "actually undermine the educational value and quality of debates." Let America Decide, *supra*, at 148.

Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all. A broadcaster might decide " 'the safe course is to avoid controversy,' . . . and by so doing diminish the free flow of information and ideas." *Turner Broadcasting System, Inc.*, 512 U. S., at 656 (quoting *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257 (1974)). In this circumstance, a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' " *Ibid.* (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964)).

These concerns are more than speculative. As a direct result of the Court of Appeals' decision in this case, the Nebraska Educational Television Network canceled a scheduled debate between candidates in Nebraska's 1996 United States Senate race. See Lincoln Journal Star, Aug. 24, 1996, p. 1A, col. 6. A First Amendment jurisprudence yielding these results does not promote speech but represses it.

C

The debate's status as a nonpublic forum, however, did not give AETC unfettered power to exclude any candidate it wished. As JUSTICE O'CONNOR has observed, nonpublic forum status "does not mean that the government can restrict speech in whatever way it likes." *ISKCON*, 505

U. S., at 687. To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property. *Cornelius*, 473 U. S., at 800.

In this case, the jury found Forbes' exclusion was not based on "objections or opposition to his views." App. to Pet. for Cert. 23a. The record provides ample support for this finding, demonstrating as well that AETC's decision to exclude him was reasonable. AETC Executive Director Susan Howarth testified Forbes' views had "absolutely" no role in the decision to exclude him from the debate. App. 142. She further testified Forbes was excluded because (1) "the Arkansas voters did not consider him a serious candidate"; (2) "the news organizations also did not consider him a serious candidate"; (3) "the Associated Press and a national election result reporting service did not plan to run his name in results on election night"; (4) Forbes "apparently had little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission"; and (5) "there [was] no 'Forbes for Congress' campaign headquarters other than his house." *Id.*, at 126–127. Forbes himself described his campaign organization as "bedlam" and the media coverage of his campaign as "zilch." *Id.*, at 91, 96. It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest. Cf. *Perry*, 460 U. S., at 49 (exclusion from nonpublic forum "based on the *status*" rather than the views of the speaker is permissible) (emphasis in original).

There is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion. Indeed, the very premise of Forbes' contention is mistaken. A candidate with uncon-

ventional views might well enjoy broad support by virtue of a compelling personality or an exemplary campaign organization. By the same token, a candidate with a traditional platform might enjoy little support due to an inept campaign or any number of other reasons.

Nor did AETC exclude Forbes in an attempted manipulation of the political process. The evidence provided powerful support for the jury's express finding that AETC's exclusion of Forbes was not the result of "political pressure from anyone inside or outside [AETC]." App. to Pet. for Cert. 22a. There is no serious argument that AETC did not act in good faith in this case. AETC excluded Forbes because the voters lacked interest in his candidacy, not because AETC itself did.

The broadcaster's decision to exclude Forbes was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment. The judgment of the Court of Appeals is

Reversed.