No. 96-779

**In the**
**Supreme Court of the United States**

October Term, 1996

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**Arkansas Educational Television Commission,** ***Petitioner,***

v.

**Ralph Forbes,** ***Respondent.***

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On Writ of *Certiorari to the United States Court of Appeals for the Eighth Circuit*

**Brief** ***Amicus Curiae of the American Civil Liberties Union, and the ACLU of Arkansas in Support of Respondent***

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## INTEREST OF THE AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to defending the constitutional rights and liberties enshrined in the Bill of Rights. The ACLU of Arkansas is one of its statewide affiliates.

This case implicates two principles that have been central to the ACLU since its founding in 1920: the general free speech right of journalists to make editorial decisions, and the obligation of government not to discriminate against nonmainstream political candidates. *Amici submit this brief because we believe that the proper resolution of this case must take into account both of these fundamental constitutional principles.*

## STATEMENT OF THE CASE

Ralph Forbes filed suit in October 1992 against the Arkansas Educational Television Commission (AETC), the Arkansas Educational Television Network (AETN), and other groups, challenging on First Amendment grounds their decision to exclude him from a televised debate among candidates for Congress in the Third District of Arkansas.[2] Forbes had submitted sufficient signatures to qualify for the ballot, and was the only ballot-qualified candidate in the race other than the major party Republican and Democratic nominees.

AETN is a state-owned and operated television network created by Arkansas law, Ark.Stat.Ann. ¤6-3-101*, et seq., for the purpose of developing and enhancing public education, and making its benefits available to the people of Arkansas. See Ark.Stat.Ann. ¤6-3-105(a); note to ¤6-3-101. The network is governed by the AETC, which has the statutory power to "control[] and supervis[e] the use of channels reserved by the Federal Communications Commission to Arkansas for noncommercial educational use," to "designate the location of stations to utilize such channels," and to "make rules and regulations governing the operation of these stations and the programs televised over these channels." ¤6-3-105(c), (d). All of the commissioners of the AETC are appointed by the governor with the advice and consent of the Senate for terms of eight years. ¤6-3-102(b)(1). AETN's Programming Policy recognizes the network's status as a state agency that must, for example, "observe[] the constitutional principle of separation of church and state." Appendix J to Petition for Writ of Certiorari at 99a (Cert.App.).*

Although a state agency, AETN is not simply a mouthpiece for the ideas and viewpoints of the government of Arkansas. According to its Programming Policy, "AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources." Cert. App. at 98a. It subscribes to the "Statement of Principles of Editorial Integrity in Public Broadcasting," *id. at 99a, developed at the Wingspread Conference on Editorial Integrity in 1985, which emphasizes the importance of protecting all public broadcasters from "extraneous interference and control," as well as fostering "journalistic objectivity" and "a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." Id. at 68a, 69a.*

AETN's Programming Policy also stresses the network's obligation to "further[] the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time." *Id. at 100a. It adds: "In matters of public importance that may be controversial, special attention is invested to assure fairness in treatment of different points of view." Id.*

Nevertheless, in September 1992, AETN denied Forbes' request to be included in the Third District candidates' debate which it had scheduled for October 22nd. Its reason, according to its executive director, was that AETN had "made a bona fide journalistic judgement that our viewers would be best served by limiting the debate to elected nominees of the two major parties." *Id. at 103a. AETN then promoted the debate with an advertisement that said:*

> Do you know your candidate? Get better acquainted with the candidates and the issues. Democrat John Van Winkle of Fort Smith and Republican Tim Hutchinson of Bentonville debate the issues as they campaign for the Third Congressional District seat, live tonight at 7:00, AETN, where learning never ends.

Joint Appendix (J.A.) at 135.

Forbes then filed suit and moved for a preliminary injunction ordering his inclusion in the October 22nd debate. The district court denied his motion, relying on the then-governing Eighth Circuit precedent of *DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990), which had rejected a political candidate's First Amendment claim of access to a televised campaign debate sponsored by a government broadcaster. See Forbes v. Arkansas Educational Television Network Found. (Forbes I), 22 F.3d 1423, 1428 (8th Cir. 1994), cert. denied, 115 S.Ct. 500 (petition of AETC); 115 S.Ct. 1962 (1995)(petition of Forbes). The district court subsequently dismissed*

*Forbes' complaint for failure to state a claim. See Forbes v. Arkansas Educational Television Comm'n (Forbes II), 93 F.3d 497, 500 (8th Cir. 1996).*

The Eighth Circuit reinstated the First Amendment claim on appeal, overruling *DeYoung in part. Specifically, the Eighth Circuit held that, if the facts showed that AETN had created a "limited public forum" for the televised debate, "then Forbes would have a First Amendment right to participate" and "could be excluded only if AETN had a sufficient government interest." Forbes I, 22 F.3d at 1429. The court further held that "if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights," even if the state-sponsored debate were a "nonpublic forum." Id. The case was remanded for factfinding on these two issues.*

On remand, the case was tried to a jury, which found in response to special questions that AETN's decision to exclude Forbes was neither "the result of any political pressure coming from outside the professional staff of AETN," nor a product of "disagreement with his opinions." *Forbes II, 93 F.3d at 501. Based on these answers, the district court found no viewpoint discrimination. Since the court had also ruled as a matter of law that the debate was a nonpublic forum, it entered judgment for AETN. Id.*

The Eighth Circuit again reversed. Although approving the district court's handling of the viewpoint discrimination issue, it took issue with the trial judge's determination that AETN had not created a limited public forum when it sponsored the televised debate. Citing *Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. , 115 S.Ct. 2510 (1995), and Widmar v. Vincent, 454 U.S. 263 (1981), the court of appeals found that the debate was a limited public forum because AETN, "by staging the debate, opened its facilities to a particular group -- candidates running for the Third District Congressional seat." Forbes II, 93 F.3d at 504.*[3] *Emphasizing that "we are dealing here with political speech by legally qualified candidates, a subject matter at the very core of the First Amendment," id., the Eighth Circuit then held that the exclusion of Forbes was unconstitutional.*

## SUMMARY OF ARGUMENT

This case presents the narrow question whether a government-owned and operated broadcast network's ordinarily broad discretion to make editorial decisions must give way to First Amendment interests when the network sponsors a campaign debate among ballot-qualified candidates for political office, but excludes one such candidate on the ground that network executives do not consider his candidacy "viable" and believe that the public would be "best served" by not hearing his views. Accordingly, the case presents no occasion to question a government broadcaster's general authority to make programming decisions, advance some points of view, and exclude others. Still less does it raise any issue regarding access by outsiders to programs produced and aired by *private broadcasters, whether for-profit or nonprofit, and regardless of whether they receive government funds.*

A candidate's debate sponsored by a government broadcaster is different from almost all other television programming not only, as we argue below, because the debate constitutes a limited public forum for speech by the small, easily defined class of ballot-qualified candidates, but because the stakes are particularly high. As this Court has repeatedly noted, the First Amendment has "its fullest and most urgent application" to speech by candidates in a political campaign. *Buckley v. Valeo, 424 U.S. 1, 15 (1974) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)). Because the inevitable consequence of a decision by government broadcasters to exclude a ballot-qualified candidate will be to diminish that candidate's visibility, deprive the public of an opportunity to hear his views, "skew the debate" toward mainstream, conventional ideas, and accordingly distort the democratic process, the Court should recognize a narrow, First Amendment-based exception in these circumstances to the general proposition that government broadcasters have editorial discretion to determine the nature and viewpoint of their programming.*

The Eighth Circuit thus correctly ruled that AETN's sponsorship of the candidates' debate created a limited public forum. Unlike most programming on a government-owned television station, which is simply not a forum for speech by the general public, a televised debate for a particular political office is by its nature a forum created for political advocacy by a particular class of speakers -- here, ballot-qualified candidates for that office. AETN intentionally opened this program to a limited class of ballot-qualified candidates, and the program was completely "compatib[le] with [their] expressive activity." *Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 802 (1985).*

The Eighth Circuit erred, however, in concluding that the exclusion of Forbes was not viewpoint-based. Although the jury found that AETN did not reject Forbes because of hostility to his views or outside political pressure, the network's very conclusion that he was not "viable" and that the public was "best served" by not being exposed to his ideas was fundamentally viewpoint-discriminatory because it represented a judgment that nonmainstream or controversial opinions are not worth hearing. Thus, regardless of the nature of the forum created by a government-sponsored candidates' debate, AETN's exclusion of Forbes on the basis of perceived nonviability or unpopularity violated the strong First Amendment command of viewpoint neutrality.

The rejection of Forbes was also, as the Eighth Circuit ruled, fundamentally unreasonable "in light of the purpose served by the forum." *Cornelius, 473 U.S. at 806. It vests too much discretion in state employees -- even when they are journalists -- to permit them to exclude a ballot-qualified candidate from a televised debate based on their perception that hearing the candidate's views will not be in the best interests of the public. Indeed, such an exclusion contravenes AETN's own educational purpose because it deprives the public of political information and ideas in the important context of an electoral campaign.*

Recognizing the existence of a limited public forum here, and acknowledging that the exclusion of Forbes was both unreasonable and viewpoint-based, will not interfere with the otherwise broad discretion of government broadcasters to determine the nature and quality of their programming. This case turns on two relatively unique facts: the creation of a forum and the context of an election. When these facts are not present, a state-owned broadcasting station resembles in many respects a public library, a public museum, or even a public university -- entities owned and financed by government, yet vesting substantial editorial discretion in the professional employees who decide what literature, art, or educational materials will be communicated. Under other circumstances, therefore, the professional decisions of these employees are themselves entitled to First Amendment protection -- as, for example, when a state-employed university professor resists forced loyalty oaths or other infringements of academic freedom. However, as the present facts demonstrate, these employees are *also state actors, and in some cases can violate the First Amendment rights of others.*

## ARGUMENT

### I. GOVERNMENT BROADCASTERS ARE GENERALLY ENTITLED TO BROAD PROGRAMMING DISCRETION AND GOVERNMENT BROADCAST NETWORKS SHOULD NOT BE REGARDED, FOR MOST PURPOSES, AS A FORUM FOR SPEECH BY MEMBERS OF THE PUBLIC.

The question of whether and how the First Amendment applies to a government agency that operates a broadcast network is a complex one. On the one hand, it is clear that the First Amendment "protects the press *from governmental interference; it confers no analogous protection on the Government." Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973)(emphasis in original) (Stewart, J., concurring). At the same time, the care that AETN has taken to establish its editorial integrity undoubtedly reflects important First Amendment values, including the right of the public to receive information free from partisan political constraints. See Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982); Lamont v. Postmaster General, 381 U.S. 301 (1965). As AETN's Programming Policy makes clear, the network asserts a high degree of editorial independence and does not view itself as simply a propaganda arm of the state. A fortiori, this is true of the journalists employed by AETN.*[4]

Accordingly, *amici agree with the observation of the plurality in Muir v. Alabama Educational Television Comm'n, 688 F.2d 1033, 1041 (5th Cir. 1982)(en banc), cert. denied, 460 U.S. 1023 (1983)(rejecting a First Amendment challenge to the cancellation of a controversial program), that government broadcasters generally should have the same ability "to make free programming decisions as their private counterparts." As Judge Rubin explained in a separate concurring opinion (joined by Judges Politz, Randall and Williams):*

> The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions. State agencies publish alumni bulletins, newsletters devoted to better farming practices, and law reviews; they operate or subsidize art museums and theater companies and student newspapers . . . . The first amendment does not dictate that what will be said or performed or published or broadcast in these activities will be entirely content-neutral. In those activities that, like television broadcasting to the general public, depend in part on audience interest, appraisal of audience interest and suitability for publication or broadcast inevitably involves judgment of content.

*Id. at 1050.*[5]

Thus, even though a government agency, AETN retains editorial discretion in most circumstances to design programming that it believes is educational and valuable without oversight by the judiciary or any other branch of government.[6] Properly understood, most of a government broadcaster's programming decisions simply do not fit within traditional forum analysis because the broadcaster has not ceded its platform to outside speakers. *Compare Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). Even invited guests who appear on a program generally do so within a format over which the broadcaster retains editorial control.*[7]

But because AETN is a government agency, it is also bound by the First Amendment, and once it exercises its discretion to create a forum for qualified political candidates it must bear the constitutional consequences of its decision.[8] Despite disagreements over the outcome, the various opinions in *Muir accepted the principle that government broadcasters may be subject to First Amendment constraints in appropriate circumstances. See 688 F.2d at 1050 (Rubin, J., et al., concurring)(different First Amendment requirements exist when state is "conducting an activity that functions as a marketplace of ideas" than when it "is devoted to a specific function" such as publishing a military newspaper or holding a press conference); id. at 1053-60 (Johnson, Hatchett, Anderson, Tate, and Thomas A. Clark, JJ., dissenting) (government broadcaster's cancellation of already scheduled program because of political pressure should be seen as unconstitutional); id. at 1060 (Reavley, J., dissenting)(government broadcaster has editorial discretion, but may not make decisions based upon "viewpoint alone"). Even the court in Chandler v. Georgia Public Telecommunications Comm'n, 917 F.2d 486, 489 (11th Cir. 1990), cert. denied, 112 S.Ct. 71 (1991), although denying the First Amendment claims of two candidates excluded from state-sponsored television debates, noted that "the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment."*[9]

This Court has also recognized that state actors have constitutional obligations to the public when they publish, broadcast, distribute literature, or otherwise engage in the business of communicating ideas. In *Board of Education v. Pico, 457 U.S. at 870-71, a plurality held that the First Amendment limits the power of local school boards to remove books for ideological reasons.*[10] *Other courts have come to like conclusions as they have struggled to balance the competing claims of the public and of government decisionmakers in dealing with government-disseminated speech.*[11] *E.g., Serra v. General Services Admin., 847 F.2d 1045, 1048-49 (2d Cir. 1988)(citing Pico)(even with respect to government-owned artwork, "there are conceivably situations in which the Government's exercise of its discretion . . . could violate the First Amendment rights of the public . . . [I]t is possible that the Government's broad discretion to dispose of its property could be exercised in an impermissibly repressive partisan or political manner"); Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371, 381-82 (5th Cir. 1989)(even though state-owned bar journal has editorial independence, it is nevertheless bound by First Amendment, so that decisions must be reasonable and viewpoint-neutral); Bryant v. Secretary of the Army, 862 F.Supp. 574 (D.D.C. 1994)(rule banning writings "not in consonance with policies of the Department of the Army" in "personal commentary" section of military publication is unconstitutionally viewpoint-based); Aldrich v. Knab, 858 F.Supp. 1480, 1490-94 (W.D.Wash. 1994)(state university-owned radio station had opened itself as nonpublic forum to speech by volunteers and thus could make general editorial decisions but not discriminate based on speakers' viewpoints).*

As in *Pico, Serra, Estiverne, Bryant, and Aldrich, so here, the problem is to reconcile the government-employed speakers' discretion with the public's First Amendment right to receive relevant information about a political campaign, and the candidate's First Amendment right to avoid discriminatory exclusion from a government-sponsored debate. Given that the First Amendment has "its fullest and most urgent application" to political campaign speech, Buckley v. Valeo, 424 U.S. at 14-15, the balance in this case must tilt in favor of Forbes and the public. As Judge Clark noted in Chandler,*

> For the state to set up . . . a debate and exclude certain candidates not only puts its stamp of approval on the favored candidates, it also "curtail[s] access to ideas" by preventing the ideas and information that would be produced through the debating candidates' interaction from coming to light.

917 F.2d at 493-94 (Clark, J., dissenting).[12]

## II. WHEN A GOVERNMENT BROADCASTER SPONSORS AND AIRS A POLITICAL CAMPAIGN DEBATE, IT CREATES A LIMITED PUBLIC FORUM FOR SPEECH BY BALLOT-QUALIFIED CANDIDATES

In this case, AETN's editorial discretion was limited by its creation of a limited public forum for speech by candidates for the Third Congressional District.[13] That is, the televised debate was not like most AETN programs, in which the government broadcasters frame the subject matter and decide what viewpoints will be heard. Instead, for purposes of the debate AETN essentially turned the microphone over to the candidates. As Judge Clark perceived in *Chandler, so here, AETN "already decided to give over its airwaves to political contenders for [elected] office[]." 917 F.2d at 493 (Clark, J., dissenting).*

This Court ruled in *Cornelius that two factors guide the determination whether a state agency has opened a limited forum for citizens' speech: first, the agency's intent "to designate a place not traditionally open to assembly and debate as a public forum" and, second, "the nature of the property and its compatibility with expressive activity." 473 U.S. at 802. AETN's candidate debate satisfies both of these requirements.*

First, by sponsoring the debate AETN opened to ballot-qualified candidates a forum (a TV program) that is not generally available for members of the public. The fact that this was a forum so limited that only three people qualified does not change its nature,[14] for Forbes was certainly in the "class of speakers" for which the forum was designed. As the Second Circuit explained in *Travis v. Owego-Apalachin School Dist., 927 F.2d 688, 692 (2d Cir. 1991), "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre" (emphasis added). See also Estiverne, 863 F.2d at 378 n.10 (in limited public forum, medium "must at least be designed to provide a vehicle for expressive activity by the class of speakers claiming access"). Thus, the Eighth Circuit properly ruled that AETN could not, "simply by its own ipse dixit, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation." Forbes II, 93 F.3d at 504. Or, as this Court reiterated in Rosenberger, 115 S.Ct. at 2517, "[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set."*[15]

The televised debate was also a limited public forum because of "the nature of the property and its compatibility with expressive activity" by all three candidates. *Cornelius, 473 U.S. at 802. As noted, as a ballot-qualified candidate Forbes was a member of the limited class whose campaign speech was compatible with the forum that AETN created. Indeed, AETN's advertisement created the impression that all candidates were included -- "Do you know your candidate? Get better acquainted with the candidates and the issues . . . ." (J.A. 135) -- while falsely implying that the Republican and Democratic nominees were the only available choices.*

AETN and its *amici, making a great issue of Forbes' limited support and shoestring approach to campaigning, argue essentially that AETN can redefine the forum to include only "serious" or "viable" candidates.*[16] *But the State of Arkansas had already determined Forbes' viability by certifying that he was ballot-qualified. In rejecting Forbes, AETN in essence made a judgment that his ideas were not worth hearing despite his ballot-qualified status -- a judgment that condemned him to marginality, and that government agencies should not make even under the guise of journalistic discretion. For, as scholars have observed with respect to independent candidacies, "[t]he prophecy that a candidate cannot win is self-fulfilling." Steven J. Rosenstone, Roy L. Behr, & Edward Lazarus, THIRD PARTIES IN AMERICA 39 (2d ed. 1984). Because state broadcasters, like public schools and other government agencies, have unique potential for manufacturing consent, indoctrinating, and controlling access to ideas,*[17] *there is particular danger of skewing the political process in favor of the status quo when a government agency decides that the public would be "best served" by hearing only the views of the major parties.*

Ultimately, the "nature of the forum" is compatible with expressive activity by all three candidates because of the political and historical importance of independent parties in electoral campaigns. Independent and third party candidates have long been gadflies, challengers, and question-raisers. This Court has noted that "[h]istorically 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 mainstream," *Anderson v. Celebreeze, 460 U.S. 780, 794 (1983); and that "[a]ll political ideas cannot and should not be channeled into the programs of the two major parties. History has amply proved the virtue of political activity*

*by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted." Sweezy v. New Hampshire, 354 U.S. at 250-51.*

This process of challenging the comfortable views of the major parties and forcing mainstream candidates to confront questions that they might otherwise ignore is critical to the process of peaceful social change. Third parties have a unique capacity "to affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have ignored." Rosenstone, *et al., THIRD PARTIES IN AMERICA at 8. History thus belies any notion that a ballot-qualified candidate's relative lack of immediate electoral "viability" makes his participation in a government-sponsored debate "incompatible" with the nature of the forum.*[18]

As this Court has often recognized, political campaign speech is at the heart of the First Amendment. *See, e.g., Buckley v. Valeo, 424 U.S. at 14-15; Mills v. Alabama, 384 U.S. 214, 218 (1966)("a major purpose" of First Amendment "was to protect the free discussion of governmental affairs , . . . of course includ[ing] discussions of candidates"). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." McIntyre v. Ohio Elections Comm'n, 514 U.S. , , 115 S.Ct. 1511, 1519 (1995). AETN's debate program was a limited public forum most fundamentally because at the very heart of our democracy is the principle that all ballot-qualified candidates for political office should be heard, and therefore that a government broadcaster cannot close a campaign debate to those aspirants whom it deems unsuitable, or whose ideas it thinks most voters will not take seriously.*

## III. REGARDLESS OF THE NATURE OF THE FORUM CREATED BY AETN, ITS EXCLUSION OF FORBES WAS UNCONSTITUTIONALLY VIEWPOINT-BASED AND NOT REASONABLY RELATED TO THE PURPOSE OF THE DEBATEII.

As *Perry Educational Ass'n, Cornelius and, mostly recently, Rosenberger have made clear, even when a forum for citizen speech is "nonpublic," a government decision to deny access must be both "reasonable in light of the purpose served by the forum" and "viewpoint-neutral." Cornelius, 473 U.S. at 806. AETN's decision to exclude Forbes was neither. Since the televised debate was at the very least a "nonpublic forum" for ballot-qualified candidates, the exclusion of Forbes was unconstitutional regardless of how the Court ultimately characterizes the debate for purposes of forum analysis.*

### A. Deciding That a Ballot-Qualified Candidate Is Not Viable Or That The Public Will Be "Best Served" By Excluding Him From A Debate Is Viewpoint Discrimination.

This Court in *Rosenberger held that a public university's denial of student activity funding to a publication that promoted a "religious perspective" was unconstitutionally viewpoint-based. 115 S.Ct. at 2518. The Court rejected a narrowly "bipolar" definition of viewpoint discrimination in favor of a more realistic understanding that public debate is by nature "complex and multi-faceted," and that discrimination against whole categories of ideas can "skew" that debate "in multiple ways." Id. See also Lamb's Chapel v. Center Moriches, 508 U.S. at 390-91.*

The *Rosenberger ruling is consistent with numerous precedents condemning discrimination against ideas or speakers because they are deemed "dangerous," unpopular, or controversial. See, e.g., McIntyre v. Ohio Elections Comm'n, 115 S.Ct. at 1519 (controversial political viewpoints are "the essence of First Amendment expression"); Texas v. Johnson, 491 U.S. 397, 414 (1989)(government may not prohibit expression of ideas simply because they are disagreeable); Consolidated Edison v. Public Service Comm'n, 447 U.S. 530, 537-38 (1980)(rejecting argument that government can constitutionally restrict both sides on "controversial issues of public policy"; "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth"); Regan v. Taxation With Representation, 461 U.S. 540, 548 (1983)(government may not discriminate in subsidy or benefit programs "in such a way as to `[aim] at the suppression of dangerous ideas'")(quoting Cammarano v. United States, 358 U.S. 498, 513 (1959), and Speiser v. Randall, 357 U.S. 513, 519 (1958)).*[19]

The Eighth Circuit thus understood the concept of viewpoint discrimination too narrowly. Viewpoint discrimination occurs not only when a government agency acts, in a "bipolar" sense, out of hostility to a particular point of view, but when it disfavors a minority perspective on a given subject because it is unpopular, marginal, controversial, or otherwise not deemed to "best serve" the viewing public. As Judge Clark observed in

*Chandler, excluding minor party candidates based on judgments about the best interests of the voters amounts to viewpoint discrimination because it derives from a belief that "the viewpoints of the Libertarians [are] less valuable than those of the Democrats and Republicans." 917 F.2d at 491-92 (dissenting opinion). So here, as the Brief Amici Curiae of the States of California, et al., in fact acknowledges, excluding Forbes "convey[ed] the message" of the government that his candidacy was not worthy of attention. AETN's disqualification of Forbes was viewpoint discriminatory because it arose from a bias favoring the status quo, valuing major over minor party candidates and ideas, and devaluing the uninhibited and wide-ranging political debate that the First Amendment contemplates.*

**B. Excluding Forbes was Unreasonable in Light of the Forum's Purpose.**

AETN's decision to exclude Forbes based on its judgment that he was not a viable candidate, and that the public would not be "best served" by hearing his views, was also unreasonable in light of the purpose of a televised debate. As noted above, judgments about a candidate's viability or likelihood of success too often become self-fulfilling prophecies. Moreover, minor party candidates raise issues that the more mainstream candidates would otherwise ignore. *See Point II, supra. Thus, the fundamental purposes of a political debate among qualified candidates are ill-served when government excludes those holding opinions that are considered controversial, unpopular, or radical.* [20]

Forbes' exclusion was particularly unreasonable in light of AETN's own policy commitment to "further the goals of a democratic society by enhancing public access to the *full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time." Cert.App. 100a (emphasis added). The network violated this provision of its own Programming Policy when it took it upon itself to decide that the voters were "best served" by not hearing the views of one of the contest's ballot-qualified candidates. Judged by its own standards, therefore, AETN's decision was unreasonable.*

The Court of Appeals for the Fourth Circuit observed in *Multimedia Publications v. Greenville-Spartanburg Airport, 991 F.2d 154, 159 (4th Cir. 1993), that the reasonableness of speech restrictions in a nonpublic forum should be scrutinized with some care because "protected First Amendment activity" is at stake. The court accordingly struck down a local airport's ban on newsracks because none of the reasons asserted to support it was persuasive. AETN's paternalistic judgment that it knew what was "best" for the voters of the Third District is equally unpersuasive, and was as unreasonable in relation to the purpose of a campaign debate as was the Greenville-Spartanburg Airport's newsrack ban in Multimedia or, for that matter, the Los Angeles Airport's decision to prohibit all First Amendment activity in Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987).*

The court of appeals in this case accurately summarized the unreasonableness of AETN's action:

> AETN itself characterizes the criteria it used as . . . "essentially subjective" . . . . In a sense, the State of Arkansas had already, by statute, defined political viability. Mr. Forbes had gathered enough signatures to appear on the ballot. So far as the law was concerned, he had equal status with the Republican . . . and Democratic nominee. Whether he was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication . . . .
>
> The question of political viability is, indeed, 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 II, 93 F.3d at 504-05.*

AETN and its *amici make exaggerated claims that the sky will fall on all editorial discretion for all noncommercial broadcasters if the Eighth Circuit's judgment is affirmed. But invalidating AETN's decision to exclude Forbes from its televised campaign debate will not interfere with the network's journalistic control over the great bulk of its programming, will have no effect at all on the nongovernmental press, and represents a constitutionally proper balance between the editorial needs of government broadcasters and the First Amendment rights of the public and of nonmainstream candidates to an "uninhibited, robust, and wide-open" exchange of political views in a government-sponsored forum. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).*

## CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: June 27, 1997

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## NOTES

1 Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and no person, other than *amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.*

2 Forbes also sued the members and officers of AETN, and then-Governor Clinton. In addition to his First Amendment claims, he alleged violation of the political campaign equal-access law, 47 U.S.C. §315(a), an issue that the courts did not address since they found that §315(a) did not create a private right of action. *See Forbes v. Arkansas Educational Television Network Found., 22 F.3d 1423 (8th Cir. 1994), cert. denied, 115 S.Ct. 500 (petition of AETC); 115 S.Ct. 1962 (1995) (petition of Forbes). In November 1992, he amended his complaint to challenge the decision of two private networks not to air one of his antiabortion advertisements except during "safe harbor" hours. 22 F.3d at 1427. Only the First Amendment issue is now before this Court.*

3 Because the historical facts were not in dispute, the Eighth Circuit treated the limited public forum question as one of constitutional fact appropriate for de novo review under *Bose Corp. v. Consumers Union, 466 U.S. 485 (1984). See Forbes II, 93 F.3d at 502-03.*

4 Their status as public employees does not divest them of their First Amendment rights. *See, e.g., Rankin v. McPherson, 483 U.S. 378, 383-84 (1987); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Pickering v. Board of Education, 391 U.S. 563 (1968). Moreover, government-employed professionals working in traditional realms of intellectual inquiry and free expression, such as libraries or public universities, have heightened constitutional protection. E.g., Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957); id. at 262-63 (Frankfurter, J., concurring); Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967).*

*This does not mean, however, that a government broadcast agency it-self has First Amendment rights, as AETN argues. Petitioner's Brief at 42-46. AETN's error is to confuse the free speech and academic freedom rights of public employees vis-a-vis the agencies that employ them with management decisions of the government agencies themselves.*

*Because AETN and AETC are unquestionably agencies of state government, this case does not raise the question whether government-created private entities like the Corporation for Public Broadcasting or the Legal Services Corporation may in some circumstances have First Amendment rights. Cf. Lebron v. National Railroad Passenger Corp., 513 U.S. , , 115 S.Ct. 961, 970 (1995).*

5 The difficulty of defining exactly how AETN fits in the broad and diverse category of government speech is exemplified by the conflicting positions taken by AETN itself (Pet.Br. at 44, arguing that AETN is actually *adversarial to the state), and the amici States of California, et al. (arguing that government is always the speaker where it owns and operates the broadcast entity).*

6 Although they have substantial editorial discretion, government-owned broad-cast stations are not equivalent for constitutional purposes to private nonprofit broadcasters that simply receive some degree of government financing. First, unlike private nonprofits, government broadcasters are state actors, with constitutional obligations of their own. Second, private broadcasters have full First Amendment rights, whereas any First Amend--ment interest in government broadcasting would inhere in its employees, not in the agency itself (see note 4, *supra).*

*AETN and some of the amici attempt to obscure any distinction between the private and the government-operated press by broadly citing Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1984). FCC v. League, however, involved the First Amendment rights of private noncommercial broadcasters. Id. at 393-95. The present case, by contrast, concerns only the obligations of government agencies holding broadcast licenses in those limited situations when they open up a forum for qualified electoral candidates. Thus, the fear of the amici Association of American Public Television Stations (AAPTS) that affirmance of the Eighth Circuit's judgment would have dire effects on private broadcasters is misplaced.*

*Likewise, the Federal Communication Commission's concern that an affirmance here would undermine the overall editorial independence that it expects from its licensees is misplaced. Moreover, it is oddly illogical, considering the controls that the agency itself exerts over programming content, and not only with respect to campaign coverage. E.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978); FCC Brief at 3-4 (broadcasting must be responsible to "identified needs of the community"); id. at 6 (under 47 U.S.C. §315(a) as currently interpreted by the Commission, FCC decides whether broadcaster qualifies for exemption from candidate access requirement based on its assessment of "reasonableness" and "good faith" of broadcaster's decision).*

7 It is certainly possible that AETN or other government broadcasters could transform some of their programs (other than political campaign de-bates) into fora for speech by at least some members of the public by inviting them to participate on a viewpoint-neutral basis. However, there are not many programs other than a campaign debate that could easily be classified as a *limited public forum. Indeed, it is difficult to imagine other contexts in which the "class of speakers" entitled to access would be so readily identifiable, and in which the "nature of the [pro-gram]" would be so clearly "compatib[le] with expressive activity" by members of that class. Cornelius, 473 U.S. at 802 (see Point II, infra).*

8 Because AETN is part of Arkansas' state government, it is different not only from private broadcasters but from other private debate sponsors. Compare *Perot v. Federal Election Comm'n, 97 F.3d 553, 558 (D.C.Cir. 1996), cert. denied, U.S., 65 U.S.L.W. 3753 (1997).*

9 A scholar has suggested that where government broadcasters have clearly delineated lines of editorial decisionmaking, outside political interference "by the governing board or other public official would be as objectionable in first amendment terms as similar intervention by a university president . . . in the case of a state university press." William C. Canby, Jr., "The First Amendment and the State as Editor: Implications for Public Broadcasting," 52 Tex.L.Rev. 1123, 1164 (1974). Cf. David Cole, "Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech," 67 N.Y.U.L.Rev. 675 (1992) (pro-posing "spheres of neutrality" where government funds universities and other traditional fora for free expression).

10 A concurrence by Justice White, who provided the fifth vote in Pico, implicitly assumed that some reasons for library book removal would violate the First Amendment, 457 U.S. at 883, as, indeed, three of the dissenters stated explicitly as well. *Id. at 907 (Rehnquist, Powell, and Burger, JJ., dissenting).*

11On the problem of reconciling the editorial independence of government-employed speakers with the First Amendment rights of members of the public, *see Mark G. Yudof, WHEN GOVERNMENT SPEAKS (1983); Steven Shiffrin, "Government Speech," 27 U.C.L.A. L.Rev. 565 (1980); Marjorie Heins, "Viewpoint Discrimination," 24 Hastings Con.L.Q. 99, 150-57 (1996).*

12 Judge Clark's elaboration in this passage of the difference between campaign debates and other government broadcasting is instructive:

> [T]he decision to show or not to show a particular program or documentary and the ideas contained therein is very unlike the decision to exclude political parties from a debate. The positions put forward in a particular television program may find equally effective expression through a wide variety of media. I would not contend, therefore, that when the state shows a documentary it must

include all viewpoints in that documentary. But an idea is not a candidate, and freedom of speech has greater meaning in the election arena. There is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. A debate serves to in-form the public far more effectively than any candidate's lone appearance could, by creating a synergism between the candidates' immediately conflicting positions.

917 F.2d at 493 (Clark, J., dissenting).

13 The forum at issue here is the debate, not AETN as a whole. *See, e.g., Cornelius, 473 U.S. at 801 ("in defining the forum we have focused on the access sought by the speaker"); Lebron v. National Railroad Passenger Corp., 69 F.3d 650, 655-56 (2d Cir. 1995), cert. denied, 116 S.Ct. 2537 (1996)(same). Thus, the majority in Chandler erred when it assumed (without discussion) that forum analysis is an all-or-nothing proposition in which either the entire network is a "pure marketplace of ideas," or the state has total discretion as to all programming decisions. 917 F.2d at 488. Similarly, AETN and its amici err to the ex-tent that they focus on the government network's programming as a whole rather than the one debate that is at issue.*

14 Designated public fora usually are limited in their scope. As the Court explained in *Cornelius, 473 U.S. at 803, the designated forum recognized in Widmar v. Vincent, 454 U.S. 263, was limited to meeting places for student expression; the forum in Madison School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976), was limited to topics on the local school board meeting agenda. See also Perry Educational Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 n.7 (1983)("[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects")(citing Widmar and Madison).*

15 Indeed, if the law were otherwise, this Court's distinction between limited public fora and nonpublic fora would collapse. In both in-stances, government has provided some opportunity for expression by members of the public on government property or in government-controlled media that otherwise are not open for citizen speech of any sort. In nonpublic fora, government can impose restrictions on citizen speech so long as they are reasonable and viewpoint-neutral. In limited public fora, the same rules apply; the only difference is that government can-not for any reason, whether viewpoint-based or not, exclude speakers who are otherwise within the class or genre for which the forum was designated. If AETN may constitutionally exclude Forbes, who as a ballot-qualified candidate for Congress was clearly within the class or genre of speakers encompassed by the candidates' debate, then the limited public forum category ceases to have any meaning separate from the non-public forum.

16 Forbes had in fact won 13.8% of the vote in the Republican primary run-off for Lieutenant Governor in 1990 (J.A. 145).

17 *See Yudof, WHEN GOVERNMENT SPEAKS xv, 200-11.*

18 It also cannot be a sufficient argument against finding the debate to be a limited public forum that accommodating independent candidates might prove logistically unwieldy. For example, the numbers cited in the AAPTS Brief at 14-15 regarding presidential and other candidates appearing on ballots in recent years are misleading to the extent they suggest that a flood of idiosyncratic or unimportant candidates are crowding ballots throughout the land. Twenty-three presidential candidates appearing on the ballot in at least one state hardly amounts to 23 aspirants seeking to participate in debates in every state. In the present case, there were only three ballot-qualified candidates for the Third District seat. In the rare situations where an unmanageable number of candidates have qualified for the ballot, the government broadcaster can surely evolve reasonable content-neutral time, place and manner rules so that cacophony does not result. *See, e.g., McGlynn v. New Jersey Public Broadcasting Auth., 88 N.J. 112, 129, 439 A.2d 54, 62 (1981)(statutory access provision permits government broadcaster flexibility to determine the manner in which candidates will debate if the number is unwieldy).*

*Moreover, claims that major party candidates will refuse to debate minor party ones are both speculative and insufficient to establish a compelling interest in suppressing nonmainstream political voices. In-deed, this "major candidate veto" argument is akin to the "heckler's veto" argument that has rarely been considered a legitimate basis for restricting unpopular speech.*

19 On the viewpoint discriminatory nature of government actions that dis--favor controversial or unpopular ideas, *see Heins, Viewpoint Discrimination, 24 Hastings Con.L.Q. 99.*

20 Nor does the FCC's current interpretation of 47 U.S.C. §315(a), exempting broadcaster-sponsored campaign debates from the statute's access requirements, establish that AETN's decision was reasonable for First Amendment purposes. As the AAPTS Brief notes, at 11-12, the FCC's construction has changed at least twice since §315(a) was enacted.

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