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First Amendment Rights: Excluding Political Candidates from State-Sponsored Televised Debates

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CASE COMMENT

FIRST AMENDMENT RIGHTS: EXCLUDING POLITICAL CANDIDATES FROM STATE-SPONSORED TELEVISED DEBATES

Arkansas Educational Television Commission v. Forbes, 118 S. Ct. 1633 (1998)

*Timothy D. Aaron**

Respondent, a qualified[1] independent political candidate in Arkansas' Third Congressional District, brought suit in a federal district court to enjoin his exclusion from a state-sponsored[2] televised political debate.[3] Respondent alleged the exclusion infringed upon his First Amendment rights.[4] The district court, concluding the debate was a non-public forum, dismissed Respondent's First Amendment claim because Respondent failed to show that that exclusion was based on his particular viewpoint.[5] The Eighth Circuit Court of Appeals reversed, holding the First Amendment prohibited respondent's exclusion because the televised debate was a limited public forum.[6] The United States Supreme Court

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* This Case Comment is dedicated to my wonderful family.

1. Respondent was qualified because he had obtained the 2,000 signatures required to appear on the ballot for the seat. *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1638 (1998).

2. Petitioner, Arkansas Educational Television Commission (AETC), qualified as a state agency, owning and operating the Arkansas Educational Television Network. *See id.* at 1637.

3. *See id.* at 1638. The debate aired on public television and, due to time constraints, was limited to participation by the major party candidates and any other candidate who had strong popular support in Arkansas's Third Congressional District. *See id.* at 1637. Petitioner excluded Respondent because he lacked the requisite popular support. *See id.* at 1644. Specifically, he was excluded because the voters did not consider him a serious candidate, the media did not consider him a serious candidate, his campaign had little financial support, and he had no campaign headquarters. *See id.* at 1643-44.

4. *See id.* at 1638. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Respondent also brought a claim under 47 U.S.C. § 315, which affords political candidates a limited right of access to television airtime. *See Forbes*, 118 S. Ct. at 1638. The district court dismissed this claim and it was not an issue in the instant case. *See id.*

5. *See Forbes*, 118 S. Ct. at 1638. Restricting access to a non-public forum is permissible if reasonable and not based on opposition to the speaker's view. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985). The *Forbes* jury found that political pressure or disagreement with Respondent's views had not influenced the decision to exclude. *See Forbes*, 118 S. Ct. at 1638. Therefore, Respondent's First Amendment rights were not violated. *See id.*

6. *See* Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 504-05 (8th Cir. 1996). The Eighth Circuit concluded that the debate was a limited public forum because it was open to all

reversed the Eighth Circuit and HELD, the debate was a non-public forum and Respondent's First Amendment rights were not violated because the exclusion was based on Respondent's status rather than his viewpoint.[7]

The Supreme Court has long held that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[8] When speakers[9] are excluded from participation in an expressive activity taking place on public property, the Supreme Court has utilized a forum analysis to determine whether the speaker has a First Amendment right of access to the property.[10] The Court first determines whether the forum is public or non-public by evaluating the character and nature of the property in question.[11] The existence of a right of access to the property and the limitations for restricting access to the property depend on the type of forum involved.[12]

In 1983, the Supreme Court set forth the characteristics and boundaries of the forum analysis in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[13] In *Perry*, a union received exclusive access to a public school district's internal mail system.[14] A rival union challenged their exclusion as a violation of their First Amendment rights.[15]

The Supreme Court used a forum analysis to determine the constitutionality of the exclusive access policy.[16] The Court recognized three types of forums, each having different rights of access.[17] First, the Court referred to places that have long been open to the public for the purposes of assembly and debate as traditional public forums.[18] The Court

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candidates running for the Third Congressional District. *See id.* at 504. Speakers cannot be excluded from a limited public forum without a compelling governmental interest. *See Cornelius*, 473 U.S. at 800. The Eighth Circuit concluded that Respondent's exclusion due to a lack of political viability, or popular support, was not sufficiently compelling or narrowly tailored to survive First Amendment scrutiny. *See Forbes*, 93 F.3d at 504-05.

7. *See Forbes*, 118 S. Ct. at 1644.

8. United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981).

9. The term "speakers" as used here refers to any persons expressing themselves by any means of communication and is not limited to oral speaking.

10. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

11. *See id.* at 44-46.

12. *See id.* at 44.

13. *See id.* at 45-46.

14. *See id.* at 39-40. The exclusive access applied only to mailboxes and the mail system. *See id.* at 41. The policy did not include exclusive access to other means of communication at the schools. *See id.* Exclusive access to mailboxes and the mail system was afforded to Perry Education Association after the union was elected and certified as the exclusive bargaining representative for the Perry Township teachers. *See id.* at 40.

15. *See id.* at 41.

16. *See id.* at 45-46.

17. *See id.* at 44-46.

18. *See id.* at 45. Places that are devoted to assembly and debate "by long tradition or by

then described a second type of forum called a limited, or designated, public forum.[19] A limited public forum is one that allows speakers general access simply by government designation.[20] Restrictions on access to traditional or limited public forums[21] are subject to strict scrutiny.[22] Lastly, the Court classified public property that was not a traditional or limited public forum as a non-public forum.[23] Non-public forums are not bound by the strict First Amendment scrutiny that public forums receive.[24] Non-public restriction is reasonable[25] and not premised on opposition to the speaker's views.[26] The Court held that the school's internal mail system was a non-public forum because it was not open to the general public,[27] and concluded that the restrictions placed on access were reasonable[28] and viewpoint-neutral.[29] Therefore, the exclusion of the rival union was permissible under the First Amendment.[30]

The Court further explained the differences between limited public forums and non-public forums in *Cornelius v. NAACP Legal Defense & Educational Fund*.[31] In *Cornelius*, legal defense funds and political advocacy organizations were excluded from participation in a charity drive aimed at federal employees.[32] These organizations claimed the exclusion

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government fiat" are traditional public forums. *Id.* For example, streets and public parks are traditional public forums. *See id.*

19. *See id.* Public property opened and designated by the government "for use by the public as a place for expressive activity" is a limited public forum. *Id.*

20. *See id.* at 45. A property can be a designated public forum even if the government did not create the forum. *See id.*

21. As long as property is designated as a public forum by the government, the property is subject to the same standards concerning exclusion that apply to traditional public forums. *See id.* at 46.

22. *See id.* at 45-46. Content-based exclusions from public forums must be narrowly tailored and "necessary to serve a compelling state interest." *Id.* at 45.

23. *See id.* at 46.

24. *See id.*

25. A restriction on speech in a non-public forum is reasonable if it is "consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.'" *Id.* at 50-51 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129-30 (1981)).

26. *See id.* at 46.

27. *See id.* at 46-47. The school district did not open the mail system, by policy or practice, for general public access. *See id.* at 47.

28. *See id.* at 50. The exclusion was reasonable because it enabled the union to perform its official duties as the exclusive representative of all teachers in the district. *See id.* at 51.

29. *See id.* at 49. The Court explains that the exclusion was based on the rival union's status, rather than its particular views. *See id.*

30. *See id.* at 55.

31. 473 U.S. 788, 800 (1985).

32. *See id.* at 790. The charity drive is referred to as the Combined Federal Campaign. *See id.* In the workplace, volunteer federal employees conduct this charity drive. *See id.* The

violated their First Amendment rights,[33] arguing that the charity drive was a limited public forum.[34]

The Court analyzed the charity drive using the *Perry* public forum framework.[35] Clarifying the differences between the three forums, the Court stated that a limited public forum is created "only by intentionally opening a nontraditional forum for public discourse."[36] The key issue for the Court was whether the government intended to designate the property as public.[37] After reviewing the policy and practice of admitting organizations to participate in the drive, the Court concluded that the government did not intend to open the charity drive to the public.[38] Therefore, it classified the drive as a non-public forum.[39] In addition, the Court concluded that the exclusion satisfied the requisite reasonableness standard,[40] and that the justifications for exclusion were "facially neutral and valid."[41]

In *International Society for Krishna Consciousness v. Lee*,[42] the Court recently expanded on the requirement that exclusions from a non-public forum be reasonable.[43] In that case, a nonprofit religious organization was restricted from soliciting contributions at public airport terminals in New York.[44] The issue was whether enforcing the restrictions violated the organization's First Amendment rights.[45] The Court once again utilized a forum-based approach to assess the restrictions.[46] The Court stated that

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respondents were excluded because they did not further the drive's purpose of providing traditional health and welfare agencies a means to solicit contributions in the federal workplace. *See id.* at 807.

33. *See id.* at 795.

34. *See id.* at 804. The respondents argued that the charity drive was open for use by all charitable organizations. *See id.*

35. *See id.* at 800-06.

36. *Id.* at 802.

37. *See id.*

38. *See id.* at 804. The charity drive had a policy of admitting only "appropriate" agencies. *Id.* Further, the management of the charity drive had developed "extensive admission criteria to limit access to the Campaign." *Id.* This policy was implemented in the selection process by requiring organizations to obtain permission to participate from the charity drive officials. *See id.*

39. *See id.* at 805. The Court noted that limiting access is not dispositive to forum classification. *See id.* However, it does suggest that the government did not intend to create a forum for expressive activity. *See id.*

40. *See id.* at 809.

41. *Id.* at 812. The Court noted that regulations limiting access to a non-public forum do not need to be precise. *See id.* The Court declined to decide whether the exclusion was motivated by a bias against the excluded group's viewpoint because the issue was not fully briefed before the Court. *See id.*

42. 505 U.S. 672 (1992).

43. *See id.* at 683-85.

44. *See id.* at 676. Solicitation was only restricted within the terminals themselves. *See id.*

45. *See id.* at 674.

46. *See id.* at 678-81.

airport terminals could not be classified as traditional public forums because they historically have not been opened for expressive activity.[47] Finding a lack of intent by the operators to open the airport for expressive purposes, the Court concluded that the airport terminals were non-public forums.[48] The Court continued by explaining the reasonableness of the restrictions on solicitation.[49] It explained that if the group was allowed to freely solicit in the airport terminals, it might have a disruptive effect on the purpose of the airport.[50] In addition, the Court explained that the monitoring and crowd control duties of the State might be significantly increased if the respondent was allowed to solicit.[51] In light of the foregoing policy considerations, the Court upheld the restrictions on solicitation in the airport terminals.[52]

In the instant case, the Court expanded the category of non-public forums to include televised public political debates.[53] The Court again based its decision on the forum analysis used in *Perry* and *Cornelius*.[54] In making its decision, the Court reviewed the forum's access policy and the consequences of forbidding exclusion in light of the intended purposes of the debate.[55] After completing this thorough analysis, the Court held that the debate was a non-public forum.[56]

The Court began by analyzing the type of forum.[57] Specifically, the issue was whether the televised debate was a designated public forum or a non-public forum.[58] The Court determined that Petitioners did not intend to make the debate generally available to a class of speakers.[59] Absent this intent of general access, government property is not considered to be a public forum.[60] In the instant case, the government merely allowed

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47. *See id.* at 680.

48. *See id.* at 679-80.

49. *See id.* at 683.

50. *See id.* at 683-84. By impeding the flow of traffic, the solicitors could create disruption. *See id.* at 684. In turn, this may cause delays and inconvenience. *See id.* Although these problems may be insignificant as a result of allowing a single group to solicit, the Court found that justifications for restrictions should be measured by the potential impact of allowing all groups to solicit. *See id.* at 685.

51. *See id.*

52. *See id.*

53. *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998).

54. *See id.* at 1641.

55. *See id.* at 1642-43.

56. *See id.* at 1642.

57. *See id.* at 1641.

58. *See id.* at 1642. Both parties agreed that the televised debate was not a traditional public forum. *See id.* at 1641.

59. *See id.* at 1642.

60. *See id.*

selective access for individual speakers.[61] Although eligibility for access to the debate was open to all candidates, each had to individually obtain permission to participate in the debate.[62] The government's practice of candidate-by-candidate selective access led the Court to conclude that it did not intend to designate the debate as a public forum.[63] Therefore, the Court held that the debate was a non-public forum.[64] The Court justified its decision by explaining that deeming such a debate a public forum could ultimately lead to a reduction, rather than a promotion, of speech.[65]

Classifying the debate as a non-public forum did not complete the instant Court's First Amendment analysis.[66] The Court proceeded to determine whether the exclusion was reasonable and viewpoint-neutral.[67] It concluded that the respondent's exclusion was due to his status as an unpopular candidate.[68] Exclusions resulting from a speaker's status, as opposed to those relating to a speaker's viewpoint, are permissible in non-public forums.[69] Therefore, the Court found that the exclusion was viewpoint neutral,[70] and held that the respondent's First Amendment rights were not violated.[71]

In the instant case, the majority stated that a limited public forum is created only by intentionally opening a nontraditional public forum for use by the general public.[72] However, the Court failed to find the intent necessary to create a public forum.[73] It found that the television station

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61. *See id.* at 1642-43.

62. *See id.*

63. *See id.*

64. *See id.* at 1643.

65. *See id.* After determining the debate was a non-public forum, the Court justified its decision on policy grounds by exploring the consequences of allowing general access. *See id.* The Court stated that to include all of the candidates on the ballot in the debate would undermine the purpose of the debate. *See id.* With a limited amount of time to air the candidates' views, the station had to either exclude some candidates or spread the time evenly over a possibly infinite number of qualified candidates. *See id.* at 1637, 1643. The Court explained that given these two options, some stations may choose to cancel the debate, therefore reducing the amount of speech allowed. *See id.* at 1643.

66. *See id.*

67. *See id.*

68. *See id.* at 1644.

69. *See id.*

70. *See id.* However, the dissent argues that the lack of objective criteria for exclusion gives the AETC limitless discretion to exclude candidates. *See id.* at 1648 (Stevens, J., dissenting). The dissent states that the lack of exclusion criteria allowed AETC to make "ad hoc judgements about the dimensions of its forum." *Id.* at 1647 (Stevens, J., dissenting). Therefore, the dissent would require objective standards in an effort to reduce the possibility of viewpoint-based exclusions. *See id.* at 1649-50 (Stevens, J., dissenting).

71. *See id.* at 1644.

72. *See id.* at 1641.

73. *See id.* at 1642-43.

made candidate-by-candidate determinations of who would participate in the debate.[74] Similarly, in *Cornelius*, determinations of participation in a charity drive were made on an agency-by-agency basis.[75] Following its decision in *Cornelius*, the instant court held that the use of selective access refuted the contention that the debate was opened to a class of speakers.[76] Instead, the instant Court found that access was reserved for a specified class of speakers.[77] Members of this class then had to receive individual permission to participate in the debate.[78]

In his dissent, Justice Stevens criticized the instant Court's reasoning.[79] In the instant case, the debate was open to all viable candidates.[80] Therefore, Justice Stevens stated that the debate could have been considered a limited public forum open to the class of all viable candidates.[81] The problem with this argument is that it departs from the Court's prior decisions.[82] Following Justice Stevens's reasoning, the school mail system addressed in *Perry* would have been considered a limited public forum open to all parties that obtained permission from the school district to have access to the internal mail system. Justice Stevens's forum analysis would transform almost all non-public forums into limited public forums. However, the Court in *Perry* found that "[t]his type of selective access [did] not transform government property into a public forum."[83] In the instant case, the Court found that the distinction between general access and selective access furthers First Amendment interests.[84] Specifically, the instant Court noted that if this distinction was not recognized, the government might choose to close the forum to all speakers thereby avoiding any potential controversy.[85] Therefore, the instant Court concluded that the debate, having selective access, was a non-public forum.[86]

As the Court stated in *Cornelius*, restrictions on access to a non-public forum must be viewpoint-neutral and reasonable in light of the property's

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74. *See id.*
75. *See Cornelius*, 473 U.S. at 805.
76. *See Forbes*, 118 S. Ct. at 1642-43.
77. *See id.*
78. *See id.* at 1642.
79. *See id.* at 1649 n.18 (Stevens, J., dissenting).
80. *See id.* at 1637.
81. *See id.* at 1649 n.18 (Stevens, J., dissenting).
82. *See Cornelius*, 473 U.S. at 804-05.
83. *Perry*, 460 U.S. at 47.
84. *See Forbes*, 118 S. Ct. at 1642.
85. *See id.* at 1643. In fact, as a result of the lower court's decision in this case, the Nebraska Educational Television Network cancelled a scheduled United States Senate debate. *See id.*
86. *See id.*

intended purpose.[87] The instant Court found that the exclusion of Respondent was a result of his status as a non-viable candidate.[88] Under *Perry*, exclusion based on one's status rather than their viewpoint is permissible.[89]

One potential problem not addressed by the instant majority is that the exclusion may have concealed a bias towards the speaker or his viewpoint. Justice Stevens addressed this problem in his dissent, arguing that the television station should have had more objective criteria for excluding candidates.[90] While noting a viable concern, unfortunately the caselaw relied on by Justice Stevens sets standards inapplicable to the forum in the instant case. His argument is supported by previous cases requiring objective, definite standards in limited public forums.[91] However, by definition, limited public forums and non-public forums are governed by different standards.[92] In *Cornelius*, the Court stated that limited public forum exclusions must be narrowly drawn to achieve a compelling state interest.[93] However, exclusion from a non-public forum need only be viewpoint-neutral.[94] Therefore, the narrow standards that Justice Stevens would require are necessary only in limited public forums and are not necessary to show mere viewpoint neutrality.

A viewpoint-neutral exclusion also must be reasonable.[95] In *Krishna*, the restrictions were reasonable because of the potential disruptive effect of allowing general access.[96] Similarly, the instant Court relied on the potential disruption to find the exclusion reasonable.[97] It stated that if general access were granted to all candidates, then the television station would have serious problems with the time constraints.[98] Problems such as these support the instant Court's finding that the exclusion was reasonable.[99]

The Court's decision in the instant case will certainly have an impact on future political debates. Independent candidates seeking media coverage

87. *See Cornelius*, 473 U.S. at 800.
88. *See Forbes*, 118 S. Ct. at 1644.
89. *See Perry*, 460 U.S. at 49.
90. *See Forbes*, 118 S. Ct. at 1649-50 (Stevens, J., dissenting).
91. *See* Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (holding that a public forum must have articulated standards when exercising discretion in setting a parade ordinance fee); Shuttlesworth v. Birmingham, Ala., 394 U.S. 147, 150-51 (1969) (requiring narrow, objective and definite standards when issuing a permit to participate in a parade).
92. *See Perry*, 460 U.S. at 45-46.
93. *See Cornelius*, 473 U.S. at 800.
94. *See id.*
95. *See id.*
96. *See Krishna*, 505 U.S. at 685.
97. *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998).
98. *See id.*
99. *See id.*

have lost a significant opportunity to debate issues with their fellow candidates. Further, independent candidates lose a valuable opportunity to generate public support for their platform and candidacy. Therefore, the same non-viable candidate status that justified exclusion of the independent candidate will be magnified by the exclusion itself. In addition, it can be inferred from the Court's decision that if permission is required to access government property that is not a traditional public forum, then the Court will categorize that property as a non-public forum. This narrows the scope of the limited public forum, seemingly reducing the speakers' First Amendment rights. However, according to the Court, the decision actually furthers First Amendment rights.[100] The instant Court was faced with the decision of propelling an independent candidate's status as a non-viable candidate or following its longstanding public forum analysis and furthering First Amendment interests. The Court chose to follow precedent and held that the televised political debate was a non-public forum.[101]

100. *See id.* at 1642.
101. *See id.* at 1643.