

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARKANSAS EDUCATIONAL TELEVISION
COMMISSION, Petitioner v. RALPH P. FORBES

CASE NO: 96-779 *e.f.*

PLACE: Washington, D.C.

DATE: Wednesday, October 8, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARKANSAS EDUCATIONAL :

4 TELEVISION COMMISSION, :

5 Petitioner :

6 v. : No. 96-779

7 RALPH P. FORBES :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, October 8, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 RICHARD D. MARKS, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae.

20 KELLY J. SHACKELFORD, ESQ., Allen, Texas; on behalf of
21 the Respondent.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-779, Arkansas Educational Television
5 Commission v. Ralph Forbes.

6 Mr. Marks.

7 ORAL ARGUMENT OF RICHARD D. MARKS

8 ON BEHALF OF THE PETITIONER

9 MR. MARKS: Mr. Chief Justice, may it please the
10 Court:

11 The issue in this case is whether the State of
12 Arkansas may establish the Arkansas Educational Television
13 Network as an institution of the press, insulated by
14 policy, structure, and tradition from State political
15 pressure.

16 The issue is important to viewers across the
17 country who depend on public television to select and
18 deliver information, particularly so in political
19 elections but, of course, at other times, too, and this
20 case does not extend just to political debates, because if
21 the decision below stands, its rationale will not only
22 result in fewer debates and less coverage of politics, but
23 it will extend to other programs of a controversial nature
24 where the trustworthiness of public television editors
25 will be questioned because they are employees of the

1 State.

2 QUESTION: Well, I think not necessarily. It
3 all depends on the analysis that we follow, and you have
4 to ask whether this is closer to a situation of the State
5 speaking, as such, or a situation of letting candidates
6 speak.

7 I mean, it may fall on one or the other side of
8 the line.

9 MR. MARKS: Your Honor, I agree that the
10 rationale that the Court uses will, of course, affect the
11 scope of the decision, but I think that it's clear from
12 the record whether we deal with a public forum doctrine
13 rationale or whether we deal with a structural rationale
14 based on League of Women Voters.

15 QUESTION: I assume here that the station was
16 intending to let the candidates speak. The station wasn't
17 trying to put words in their mouths.

18 MR. MARKS: That's correct, Your Honor. In this
19 case we are not talking about State speech. We are --

20 QUESTION: No, and did the station set in
21 advance here the rules that it eventually came up with
22 when there was a third candidate?

23 MR. MARKS: Your Honor, the rules --

24 QUESTION: When it opened -- when it first
25 decided to have the debate, as I understand it, it just

1 said we're going to let the candidates for this office
2 come here and have a debate.

3 MR. MARKS: Not exactly, Your Honor. In fact, I
4 think that that is not a full enough characterization of
5 the record.

6 What the State decided here was to hold a
7 debate that would best serve the interests of its viewers,
8 and the record reflects that the editors went through an
9 elaborate analysis. Ms. Oliver did an elaborate
10 investigation and reported to Ms. Howarth, the editor-in-
11 chief of the Arkansas network, about those candidates who
12 were newsworthy, and it is --

13 QUESTION: I thought that occurred after this
14 third party candidate appeared and said, I want to talk,
15 too.

16 MR. MARKS: No, Your Honor. In fact, when the
17 debate discussion started, which was sometime in the
18 spring of 1992, there was a discussion, and it's reflected
19 in the testimony that we had at trial, about how the
20 debates would be structured and about their rationale, and
21 the purpose from the beginning was to provide the citizens
22 of Arkansas with a -- an opportunity to hear the views of
23 those candidates who were going to be the ones they were
24 going to be voting for, who had, in the words of the
25 witnesses, a serious chance, who were demonstrating

1 popular support by virtue of any number of factors.

2 Now, certainly --

3 QUESTION: Well, I thought that was what emerged
4 eventually in response to the request of Mr. Forbes to
5 participate, but was that laid out in all its complexity
6 at the outset?

7 MR. MARKS: Not in all its --

8 QUESTION: No.

9 MR. MARKS: -- complexity, no, Your Honor, but
10 what -- but the early discussions between Amy Oliver and
11 Bill Simmons, the chief of the Associated Press in
12 Arkansas, concentrated on whom to invite.

13 Now, when they issued the invitations the only
14 candidates who were on the list to be invited were ballot-
15 qualified candidates, and they were in each district the
16 Republican and the Democratic candidates, so when the
17 original decision was made, the only candidates who could
18 be invited were the major party candidates.

19 Mr. Forbes qualified on August 17 of 1992, and
20 his letter was August 24, but even before that, Your
21 Honor, the policies that AETN has adopted, the policy on
22 editorial integrity, the programming policy which
23 incorporates the principles of editorial integrity, set
24 out for Ms. Howarth what would be her basis for decision.

25 QUESTION: Well, I assume that this decision was

1 parallel to what a private network would do with a similar
2 debate in a similar format. Is that in the record, or do
3 I just judicially know that, or is that important for the
4 case, or --

5 MR. MARKS: Your Honor, I think that there are
6 enough cases -- the Chisolm case, the Henry Geller
7 decision at the FCC -- so that in fact from those cases
8 the Court can take judicial notice that this is a typical
9 structure for debates.

10 QUESTION: Well, I mean, other stations,
11 privately owned stations can surely do things that your
12 station is not allowed to. Could your station endorse a
13 candidate?

14 MR. MARKS: No, Your Honor, because of section
15 399 of the Communications Act.

16 QUESTION: Let's assume that's not there. As a
17 constitutional matter, would your station be able to
18 endorse a particular candidate for public office?

19 MR. MARKS: Well, Your Honor, of course that is
20 very much not this case, and I think under --

21 QUESTION: Oh, I thought it was.

22 (Laughter.)

23 MR. MARKS: Not without 399, Your Honor, because
24 the --

25 QUESTION: I mean, I know it's not this case.

1 I'm asking you, if 399 were not there, would your -- would
2 a publicly owned station as a constitutional matter be
3 able to endorse a political candidate?

4 MR. MARKS: Under forum doctrine the answer is
5 no, because I think to do that --

6 QUESTION: Under forum -- I'm not talking about
7 creating a forum. I'm just talking about a publicly owned
8 station that comes out and says we endorse, you know, the
9 Republican or the Democratic candidate for this district.

10 Now, a private broadcaster can certainly do
11 that, can he not?

12 MR. MARKS: A private broadcaster can.

13 QUESTION: But is -- do you think a public
14 broadcaster --

15 MR. MARKS: I think this public broadcaster
16 under these policies, the principles of editorial
17 integrity and AETN's programming policy, this public
18 broadcaster could not do that and stay within the bounds
19 of the policy --

20 QUESTION: Well, I would be interested in
21 hearing you answer Justice Scalia's question, which you
22 haven't done yet.

23 If the station wished to endorse a candidate,
24 could it have done so under the Constitution, without
25 regard to any statutory provision?

1 MR. MARKS: Mr. Chief Justice, I think that the
2 answer to Justice Scalia's question would depend on
3 whether that would be considered invidious discrimination,
4 and I don't think there's any precedent on it, but my
5 belief is that it would be.

6 QUESTION: Under the -- some equal --

7 MR. MARKS: Sure, under an equal protection
8 theory.

9 QUESTION: -- protection doctrine, or the First
10 Amendment?

11 QUESTION: That they couldn't do it?

12 MR. MARKS: Could not. Could not, because I
13 think that the -- I think, Justice Scalia, that there are
14 limits on what a State-owned broadcaster can do. I think
15 those bounds are set by invidious discrimination --

16 QUESTION: Well, to tie that in to where we were
17 before I asked the question, the mere fact that you're
18 using standards that a private broadcaster would use, and
19 that you're doing nothing more than what a, you know, a
20 private station would do, you're not behaving in a
21 politically biased manner, you're just behaving like a
22 good broadcaster, that doesn't help your case, because
23 there are some things that private broadcasters can do
24 that you can't do, and maybe this is one of them.

25 MR. MARKS: I think, Your Honor, that there's a

1 great difference between endorsing a candidate and having
2 the State come down that way. I think it's an equal
3 protection issue at the very least.

4 QUESTION: Well, I think that -- I'm not sure
5 about that, but can your answer be, and could we look at
6 this case as saying that we look at different programs to
7 determine what the First Amendment rules are, and we look
8 on a program by program basis, or do the same rules have
9 to apply to every part of the station's ownership,
10 management, and control in broadcasting, i.e.,
11 hypothetical about endorsement, hypothetical whether you
12 can hire all Democrats or all Republicans for the
13 editorial board and so forth?

14 We look at the precise function that's in
15 question, i.e., the conduct of debate. Is -- would that
16 be a way to answer Justice Scalia's question, and would
17 that be an adequate -- is there adequate precedent for us
18 to decide this case on that sort of analysis?

19 MR. MARKS: The answer to the second question is
20 yes, and the answer to the first question is yes. Each
21 one of these situations, each one of these questions about
22 whether a particular program satisfies this Court's
23 precedent, is a two-level analysis.

24 First you've got to analyze the intent of AETC
25 in delegating to Ms. Howarth the editorial discretion

1 within the bounds of these policies, and Justice Scalia,
2 these policies do bound her in a way that a private
3 broadcaster is not bound, because they require her to
4 consider credibility and fairness and balance and accuracy
5 and objectivity, and a private broadcaster is not bound
6 that way.

7 QUESTION: Don't you think private broadcasters
8 might think those elements were desirable, or --

9 MR. MARKS: I think most broadcasters would find
10 them desirable and, indeed, Mr. Chief Justice, the intent
11 of adopting the principles of editorial integrity was to
12 allow the public broadcaster to walk this very difficult
13 line of needing to satisfy the requirements of the First
14 Amendment as the foundation requirement, but at the same
15 time being able to satisfy the requirement in the
16 Communications Act that it control all its programming,
17 because they're --

18 QUESTION: Being responsible wouldn't allow you
19 to endorse one of the candidates for the office even if
20 you had criteria, we will not endorse any candidate
21 unless, and you set out the criteria. It may be very
22 responsible. It may be very objective, even, but that
23 doesn't prove that the Government can do it, the mere fact
24 that it's objective and responsible. You wouldn't allow
25 an endorsement of a candidate to proceed on that basis.

1 MR. MARKS: Well, Your Honor, in this case -- I
2 understand that the question is a, if I understand it
3 correctly, a polar question for analytical purposes, but
4 this case has a record, and there are distinct policies
5 here, and there is elaborate testimony --

6 QUESTION: Yes, but on the record in this case,
7 could they -- just to take the other side of Justice
8 Scalia's question, could they announce that we don't want
9 you to vote for Forbes? Don't waste your time listening
10 to him, or voting for him, concentrate on the two major
11 candidates?

12 In other words, a reverse --

13 MR. MARKS: With --

14 QUESTION: A disendorsement of him.

15 MR. MARKS: With section 399 not there, Your
16 Honor?

17 QUESTION: Yes.

18 MR. MARKS: With the prohibition not there?

19 I still believe that there's an equal protection
20 boundary for a State-owned broadcaster in that area.

21 QUESTION: Is it an invidious discrimination for
22 State-owned agents to say, we just think this guy is off
23 the wall, we don't think you should waste your time with
24 him, and if all that is true, it's invidious
25 discrimination?

1 MR. MARKS: Well, I think that is viewpoint
2 discrimination, as I understand your question, that's
3 certainly prohibited under the rationale of the forum
4 doctrine cases, because --

5 QUESTION: Well then, why isn't what you did
6 viewpoint discrimination?

7 MR. MARKS: Because in --

8 QUESTION: Because you had a lot of neutral
9 rules out there that are not in writing anywhere, but
10 governed exactly how you'd handle the debate.

11 MR. MARKS: The guiding principles are certainly
12 in writing, and there are two levels, the guidelines --

13 QUESTION: Yes, but they don't tell us whether
14 he would have been permitted to debate if he could have
15 gotten 12 percent of the vote instead of 2 percent, do
16 they?

17 MR. MARKS: That's right, Your Honor. What Ms.
18 Howarth is obligated to do is to apply the principles of
19 mainstream journalism and, under those principles, she
20 made a decision based on newsworthiness.

21 Now, it seems to me that --

22 QUESTION: Isn't that simply a way of saying
23 that the distinctly minority candidate always loses?
24 Because I presume newsworthiness is a measure of the
25 interest of the public in the candidate, and if the

1 judgment is made by the station that this candidate is a
2 loser, is never going to garner anything but a small
3 minority, and therefore is not newsworthy, then the
4 minority candidate always loses, and why isn't that a
5 pretty darned good surrogate for viewpoint discrimination?
6 The viewpoint is unpopular.

7 MR. MARKS: There are two reasons, Justice
8 Souter. First, as Mr. Perot's experiences in 1992 and
9 1996 illustrate, there can be a different conclusion based
10 on newsworthiness, and the distinctly minority candidate
11 does not always lose.

12 QUESTION: Isn't it true that you put both
13 party, major party candidates on even though one has a
14 tiny percent and so is not of much interest to the public?

15 MR. MARKS: Yes, Your Honor, and the reason, as
16 reflected in the record in the testimony of Ms. Howarth
17 and Ms. Oliver, is that a major party nomination carries
18 with it a degree of public support that news people
19 usually don't ignore, and they didn't ignore in this case.
20 They felt it was --

21 QUESTION: May I return to Justice O'Connor's
22 question about what these standards of newsworthiness
23 were? There was nothing written down in advance, and so
24 why isn't this like the legions of cases that have come up
25 with a Government official allowing, say, a permit for a

1 parade with no standards at all, and then after a request
2 is made, may be coming up with a set of reasons?

3 Generally in this area, hasn't the Court
4 required at least that there be clear standards written
5 down going in?

6 MR. MARKS: Not in a nonpublic forum, Your
7 Honor, and certainly not under a League of Women Voters
8 structural analysis. If you -- I don't think that we
9 require that -- I don't think this Court's cases
10 require --

11 QUESTION: I don't know about the League of
12 Women Voters, but we are talking about whatever else they
13 are, they are Government actors.

14 MR. MARKS: Let's -- let me address that in
15 terms of Polk County. There's no question that there's
16 State action here, but Ms. Howarth is not acting, in our
17 view, as we have said in our brief, under color of State
18 law. She is exercising independent professional judgment.
19 This is essentially a private press function. She's not
20 dependent on the State's coercive power here. She's not
21 doing this out of loyalty to the State.

22 QUESTION: If you have integrity, you're not a
23 State actor? Is that the principle that you're trying
24 to --

25 (Laughter.)

1 QUESTION: Could she refuse to allow someone on
2 account of their race --

3 MR. MARKS: No, Your Honor.

4 QUESTION: Clearly she's a State actor in that
5 sense.

6 MR. MARKS: If she crossed -- first of all, that
7 would be outside these policies that guide her, and in
8 response to Justice O'Connor's and Justice Ginsburg's
9 question, these policies do provide some guidance. It's
10 not as if the -- not as if she's out there on a chartless
11 sea.

12 QUESTION: Well, I think the question is what's
13 permissible for a State actor, not whether or not she is
14 or is not a State actor.

15 MR. MARKS: And if that's the case, Your Honor,
16 just on pure forum doctrine terms, when you're dealing,
17 Justice Ginsburg, with a nonpublic forum, then the rules
18 there need not be --

19 QUESTION: Well, who said it was a nonpublic
20 forum? I thought that was what we had to decide, and here
21 the station chose to open up a debate to selected
22 candidates. I mean, that sounds a lot like a limited
23 public forum to me, not a nonpublic forum. I guess we
24 have to resolve that, don't we?

25 MR. MARKS: Yes, Justice O'Connor, you do, but I

1 think as you phrased it the key word is selected
2 candidates, because the intent of Ms. Howarth from the
3 start was clear that she was not opening up this debate to
4 candidates who were not newsworthy.

5 QUESTION: Do you think selectivity alone means
6 that it can't be a limited public forum?

7 MR. MARKS: I think that in --

8 QUESTION: I hadn't thought so. What do you
9 rely on for that?

10 MR. MARKS: Well, I'm -- I'm not sure I
11 understand your question, Justice --

12 QUESTION: Well, I want to know whether this
13 was, as we would characterize it, in some of the cases
14 from this Court, a limited public forum, or is it a
15 nonpublic forum, and do we determine that based solely on
16 the fact that candidates were selected by the station to
17 participate?

18 MR. MARKS: We determine it based on Cornelius,
19 which set the starting point --

20 QUESTION: Well, I must say, although I played a
21 part in Cornelius, I think that can be cited for both
22 sides, because it certainly doesn't determine this case,
23 I'm afraid.

24 MR. MARKS: I think what we need to do is look
25 at Ms. Howarth's intent, and I think we need to look also

1 at the equity AETC's intent in establishing a network to
2 control all of its programming and exercise editorial
3 judgment over all of its programming.

4 QUESTION: Excuse me. We can't hear very well
5 right now. I --

6 QUESTION: You're speaking quite clearly but I
7 think it's the microphone.

8 QUESTION: I think the microphone isn't working.

9 QUESTION: It's not your problem.

10 QUESTION: It's not working.

11 QUESTION: It's not working.

12 QUESTION: So you'll have to speak up, I'm
13 afraid.

14 MR. MARKS: I can do that. Can you hear me now?

15 QUESTION: Yes, very well. Very well.

16 MR. MARKS: Justice O'Connor, the answer to the
17 Cornelius question is, what was Ms. Howart's intent?
18 What was the AETN's intent? The intent is key in both the
19 structural analysis of the reading of the League of Women
20 Voters, and on the --

21 QUESTION: Well, when you say intent, Mr. Marks,
22 you mean, what was the intent of the person planning the
23 program? Did they simply mean to turn it over to the
24 candidates, or did they mean to plan something that was
25 more like a debate where they had more control over it?

1 MR. MARKS: That's exactly correct, Mr. Chief
2 Justice, and the key is whether Ms. Howarth intended to
3 open up the debate only to newsworthy candidates, or
4 whether she intended to allow the debate to be open on a
5 nonselective basis to anybody who was ballot-qualified.

6 QUESTION: Mr. Marks, maybe I misapprehend this,
7 so tell me if I do, but my notion of a nonpublic forum was
8 a closed circuit like the teachers in the school, like the
9 Federal employees who are being solicited, that that --
10 but this, whatever else it is, it is for the public. The
11 debates are for the public, not for a group of
12 schoolteachers, not for a group of public employees, so I
13 was thinking that whatever it is, it isn't a nonpublic
14 forum.

15 MR. MARKS: Ms. Howarth's contention is that it
16 is a nonpublic forum because it was Ms. Howarth's
17 intention in providing for participation she was not
18 opening it up to all ballot qualified candidates, but only
19 to those candidates that were newsworthy, and Mr. Forbes
20 was not newsworthy. He was an ineffective candidate.

21 His efforts to fit a place in the market space
22 were feeble, he was not generating public support, and for
23 that reason Ms. Howarth concluded that his appearance
24 would not serve her audience, and for that reason it was
25 her position that he did not fit the criteria to be

1 included.

2 If I may, Mr. Chief Justice, I would like to
3 reserve --

4 QUESTION: Can I just ask, what was (inaudible)
5 reporters in advance decided what the subjects are,
6 decided what the questions will be, and they asked the
7 questions to the candidates in a very narrow area. What
8 was the nature of this debate?

9 MR. MARKS: Your Honor, you will find a
10 discussion of the debate in the motion for summary
11 judgment that was filed.

12 QUESTION: But I've looked at that, of course,
13 and I can't figure it out just on the basis of that.

14 MR. MARKS: In Mr. Simmons affidavit --

15 QUESTION: So far in looking through the record
16 I've not been able to find out what the debate (inaudible)
17 a matter of public record was the broadcast, what was the
18 format?

19 MR. MARKS: It was an hour, actually it was 53
20 minutes time for the candidates. The candidates began
21 with a 2 minute opening statement and concluded with a
22 closing statement, and between that each candidate had a
23 minute to answer each question posed by the panel of
24 journalists, and then Ms. Howarth testified that there
25 were opening and closing credits and other material.

1 QUESTION: And how many journalists were there
2 and how did they work out their questions?

3 MR. MARKS: They were selected from Associated
4 Press groups of editors and reporters who asked their own
5 questions.

6 QUESTION: Mr. Marks --

7 QUESTION: Thank you, Mr. Marks.

8 Mr. Wallace, we'll hear from you.

9 ORAL ARGUMENT OF LAWRENCE G. WALLACE

10 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

11 MR. WALLACE: Thank you, Mr. Chief Justice, and
12 may it please the Court:

13 When a governmental entity puts on a Law Day
14 program utilizing invited speakers who are not themselves
15 Government officials or employees, no one would think that
16 advocates of terrorism or anarchy could not be excluded
17 from participation as speakers.

18 Viewpoint neutrality is not required, because
19 forum analysis does not apply to the Government's own
20 expressive presentations to the public. Forum
21 analysis is instead designed to address situations where
22 the Government -- where Government property or facilities
23 are dedicated to use for private speech and the Government
24 is acting --

25 QUESTION: Well, a candidate debate is sort of

1 exactly that. The station says we want the candidates for
2 this office to come out and have a debate so the public
3 gets to hear them and communicate with them on their
4 views. I mean, why isn't that a public forum?

5 Of course a university or a station can have
6 programs and teach what it wants, but when they choose to
7 set a candidate's forum that's highly expressive and
8 communicative with the public, why isn't that different?

9 MR. WALLACE: The mere fact that non-Government
10 participants are invited to participate in the
11 Government's expressive activities does not, I would
12 argue, turn that into a forum where the Government is
13 acting only in a regulatory capacity with respect to
14 private speech to which it's dedicated its facilities.

15 QUESTION: Mr. Wallace, I'm not sure I even
16 agree with your premise that if this were not a forum,
17 that if the Government were just speaking on its own, at
18 least where it's speaking in the realm of partisan
19 politics, do you think the Government could come in and
20 say, you know, we want you folks to consider the
21 Republican Party and the Democratic Party. This other
22 party is an irresponsible party. You think a Government
23 station can do that?

24 MR. WALLACE: Well, the Government -- the
25 Communications Act prohibits --

1 QUESTION: Well, we're not talking about the
2 Communications Act, Mr. Wallace, you know. We're talking
3 about the Constitution. As I understood your position,
4 you think it is constitutional so long as the Government
5 is making its proposal itself for the Government to come
6 and say, ladies and gentlemen, you know, consider the
7 Republican candidate and the Democratic candidate. This
8 other party is irresponsible.

9 You think the Government can do that? I don't.

10 MR. WALLACE: Well, an incumbent running for
11 reelection can espouse his own political cause.

12 QUESTION: Oh, he's not speaking as a Government
13 official when he does that.

14 MR. WALLACE: Well, he may work that into his
15 official statement.

16 QUESTION: I don't suppose the President is
17 regarded to be viewpoint neutral or anything like that,
18 when he speaks, and certainly he's the top Government
19 official.

20 MR. WALLACE: Well, that is our point.

21 QUESTION: But the Attorney General can do it?
22 You think the Attorney General can come out and say,
23 ladies and gentlemen, I want you to consider voting
24 Republican. You know, the Government's paying for the
25 radio time, and the Attorney General can come out and say

1 that? I find that astounding.

2 MR. WALLACE: As far as protecting speech, it's
3 hard to see why that would violate the First Amendment
4 when a Government official is speaking. It may be
5 something we would consider improper --

6 QUESTION: Do you lose this case if this is a
7 designated public forum?

8 MR. WALLACE: Not at all. The last section of
9 our brief shows why that standard is met here in light of
10 the special verdicts of the jury exception, but we happen
11 to think that that is the correct analysis.

12 It is commonplace for non-Government
13 participants to enrich Government expressive
14 presentations. Common examples are the commencement
15 speaker at a State university, a visiting exhibition at
16 the State art museum, the authors' works that are
17 published by the State university press, a lecture series
18 that's given at the State museum --

19 QUESTION: None of those are nonpublic forum?

20 MR. WALLACE: Those are not forums at all.
21 Those are Government presentations. They're a form of
22 publishing by the Government. They don't give rise to a
23 right of access under the First Amendment by other people
24 who would like to use --

25 QUESTION: Well, I think it's rather dangerous

1 to say that at a commencement address the Government is
2 the speaker.

3 MR. WALLACE: Well, obviously views will be
4 stated that are the individual's own views, but the
5 speaker has been selected to contribute to the Government
6 program, and the -- it's the difference between Government
7 regulation or suppression of speech whether the Government
8 is required to publish speech by those who would like to
9 use the Government's way of publishing in one way or
10 another and participate in the same way, and the same
11 principles apply where a television station happens to be
12 licensed to a Government entity, that they are -- under
13 the Communications Act a broadcast licensee is a trustee
14 responsible for selecting programs that will meet the
15 needs of the community it is licensed to serve, and it
16 will fulfill that obligation by selecting programming that
17 may originate with a private entity that gives the
18 program --

19 QUESTION: But you can reach that conclusion
20 without saying the licensed entity is a Government
21 speaker.

22 MR. WALLACE: Well, the -- if you once start
23 applying forum analysis that -- it gives access rights to
24 a Government publication and their speech. If the station
25 is carrying the Metropolitan Opera broadcast does that

1 mean a composer has some enhanced right, if his opera's
2 not being broadcast on -- at the Met, to have access to
3 the station, to use the station's facilities to have his
4 opera heard?

5 QUESTION: Probably not, but nonpublic forum
6 analysis is quite capable of making that distinction.

7 MR. WALLACE: Well, but we think that the
8 principles that apply in news broadcasting are doing the
9 same thing. If there is an interview on the evening news
10 hour of private commentators to comment on a terrorist act
11 that occurred that killed people, it isn't necessary to
12 include a spokesman for the terrorist group among those
13 asked to be commentators. This is part of the
14 Government's own presentation.

15 QUESTION: Mr. Wallace, suppose we had a town
16 hall that's devoted to debates, and we have a debate there
17 among candidates, and the town leaders say, we want the
18 debate to exclude all third party candidates, is there
19 any -- is that okay, too? Are you talking about anything
20 that's peculiar to radio/television?

21 MR. WALLACE: I think that would be a closer
22 case, because we don't have the same obligation of the
23 licensee who's entrusted to use this frequency to serve
24 the needs of the community to exercise the control over
25 the programming presented. It's a much more -- it's a

1 much closer case.

2 QUESTION: Why? You just said that there's less
3 control from the point of view of the public interest in
4 the hall than in the radio/TV setting.

5 MR. WALLACE: Because the licensee is
6 responsible, in using the frequency, to select the
7 programming that it determines will serve the needs of
8 that community. That is the scheme of the act under which
9 it's operating, and it can decide that broadcasting news
10 excerpts from the campaign speeches of major candidates is
11 something worthwhile to do. It can make the same judgment
12 about how a debate --

13 QUESTION: But let's just talk about debates,
14 because to -- I thought that Chief Judge Arnold made it
15 pretty clear he was talking about debates and nothing
16 else, so we have the debate in the town hall and the
17 debate on the Government station, and you say there are
18 different rules that would apply to each?

19 MR. WALLACE: Well, there are rules that apply
20 under the Communications --

21 QUESTION: No. Let's stay with the
22 Constitution, and my question is particularly, in either
23 case would you need rules going in so you could check on
24 the integrity of the Government official?

25 MR. WALLACE: As long as it's a Government

1 program, it's clear that this is something that the
2 Government is putting on for the benefit of the public,
3 the Government can choose who shall be participants, what
4 private person shall be a participant, what private person
5 shall not be.

6 QUESTION: And it doesn't need any kind of
7 reasons, even post hoc --

8 MR. WALLACE: It has to meet equal protection
9 standards. It cannot engage in invidious or irrational
10 discrimination.

11 QUESTION: Thank you, Mr. Wallace.

12 Mr. Shackelford, we'll hear from you.

13 ORAL ARGUMENT OF KELLY J. SHACKELFORD

14 ON BEHALF OF THE RESPONDENT

15 MR. SHACKELFORD: Mr. Chief Justice, and may it
16 please the Court:

17 I'm going to take about 30 seconds and put this
18 in context. In 1990, Ralph Forbes running for lieutenant
19 governor received 47 percent of the State-wide vote in the
20 Republican primary. That vote included carrying 15 of 16
21 counties which comprised the Third Congressional District.
22 So, 2 years later, he ran for the Third Congressional
23 District. He obtained thousands of signatures and met the
24 State's standard for a candidate's seriousness and
25 qualified as one of three candidates on the ballot. Days

1 later, an unelected Government official summarily declared
2 him a frivolous candidate and banned him from its debate
3 for that very seat.

4 The Government therefore today asks this Court
5 to give it unfettered discretion to pick and choose
6 amongst candidates, and confer powerful Government
7 benefits on those it chooses, to the detriment of their
8 opponents.

9 QUESTION: Mr. Shackelford, one of the
10 suggestions that's been raised is that if in fact the
11 State is limited in what it can do here, the State will be
12 limited in what it can do almost universally throughout
13 its broadcasting, including news broadcasts and so on.
14 What's your answer to this slippery slope?

15 MR. SHACKELFORD: I think it's completely
16 inaccurate. I understand the Government's attempt to
17 widen this to all programs, but a debate, a candidate
18 debate sponsored by the Government is a particularized and
19 very unique event. It has aspects which really do not
20 apply to any other forum.

21 For instance, number 1, it involves not just
22 speech, but core political speech that this Court has said
23 is the apex of protection under the First Amendment.
24 Secondly --

25 QUESTION: Well, a news -- I -- all right. You

1 get your list out. Then I have a question.

2 MR. SHACKELFORD: Second --

3 (Laughter.)

4 MR. SHACKELFORD: -- it involves -- this is I
5 think one of the most important. It involves more than
6 speech. In this context a candidate debate involves the
7 idea that the Government can -- that Government can
8 interpose itself in an election process, possibly skewing
9 the debate and possibly affecting the outcome of the
10 election, and third, it is made by its very nature for
11 candidates, it's intending to present them to the public
12 without going through the normal sieve of editorial
13 control of media or third parties.

14 And then lastly, it is a contest, and the reason
15 you will watch these debates is because of the face-to-
16 face synergy and dynamics of the debates. There are a
17 number of factors --

18 QUESTION: May I just interrupt with this one
19 question? Wouldn't all those considerations also apply to
20 a policy of interviewing people on a Sunday news program
21 where you want to ask them what they think of the latest
22 bombing over in some place?

23 MR. SHACKELFORD: I don't think so. Number 1,
24 we would not be talking about the election process.

25 QUESTION: No, right before the election the

1 only people they want to interview, what do the
2 candidates -- what do these two leading candidates think
3 about this national issue that's just suddenly hit the
4 headlines?

5 MR. SHACKELFORD: I think that's certainly
6 different, because it wouldn't be the situation with the
7 candidate debates, where the purpose is actually for them
8 to present themselves to the public and essentially --

9 QUESTION: Well, they certainly would run to the
10 station just for that very reason. They'd want people to
11 look at them and hear what they have to say about this,
12 because they want to get votes.

13 MR. SHACKELFORD: But the purpose of -- assuming
14 this is a Government station, the purpose of the station
15 would be to create a debate where candidates are
16 presenting themselves and trying to influence the voters'
17 viewpoint. The purpose of the Government station in that
18 limited part of the program would simply be --

19 QUESTION: Well, but the purpose here was not
20 just a wide-open debate, as I understand it. It was a
21 very structured thing. The candidate -- each candidate
22 wasn't given just 15 minutes to do what you want to, but
23 the questions asked by reporters, the time for opening was
24 limited, and that sort of thing.

25 MR. SHACKELFORD: Yes, but for instance the

1 candidates were given an open microphone at the beginning
2 and the end to express their views. After each question,
3 they were given full rein to answer those questions.
4 There was no editing of the words as they came out of
5 their mouths by the Government.

6 This was really not just a forum, it was
7 actually part of the definition that this Court's given
8 for what a forum is. In *Cornelius and Perry* and a number
9 of cases, this Court in describing what a forum is, has
10 said it's public property, open quote, for assembly or
11 debate.

12 QUESTION: But one of the problems in applying
13 that kind of forum analysis here is this. If we're
14 dealing with -- take the easy example, the traditional
15 public forum, the street corner where the soap boxes are,
16 basically it's a matter of no concern whatever to the
17 process whether one person shows up with a soap box or 200
18 show up with a soap box and just sort of shout at each
19 other in a cacophony, but that does legitimately matter if
20 we're talking about a TV debate, and I guess I have two
21 questions.

22 Number 1 is, is it -- are you going to take the
23 position, to be consistent, that there can be no
24 limitation on the number of candidates, and if the answer
25 to that is no, then what is your criterion for selection?

1 MR. SHACKELFORD: We have not taken that
2 position. The position we have taken is that the
3 Government cannot subjectively pick and choose amongst the
4 candidates.

5 We agree that objective and constitutional
6 criteria, such as the ballot access laws, are appropriate,
7 and therefore we're not saying that no standards would be
8 allowed.

9 They could even, for instance, simply draw the
10 names out of a hat. For that at least would be Government
11 neutrality.

12 QUESTION: Well, how about a State where the
13 write-in procedure is very simple, and someone who is
14 perhaps defeated in a primary is going to run as a write-
15 in, and his name is Willy Wacko, and he's regarded as a
16 total loser by all political observers. Do they have to
17 give him access?

18 MR. SHACKELFORD: No, Your -- Mr. Chief Justice,
19 I don't think they do. Again, you have an objective
20 standard, set in place beforehand, a ballot access law.
21 That's perfectly allowed, but this Court's ballot access
22 decisions, what the Court has said is, it's okay to ensure
23 a modicum of support. However, the Court has never said
24 that the Government can subjectively pick and choose --

25 QUESTION: Well, you want something more than --

1 QUESTION: You're saying that the same standard
2 applies when you're talking about ballots, State
3 regulation of ballots, as applies in this situation where
4 you're talking about a State-operated --

5 MR. SHACKELFORD: Certainly the dangers are very
6 similar, in that we have Government, if they're allowed to
7 subjectively interpose themselves into the election
8 process, whether it's affecting the debate and what
9 personal issues can be discussed by the candidates, or
10 whether it is affecting, you know, the ballot, it has
11 serious consequences.

12 QUESTION: Mr. Shackelford, with respect, you
13 want something more than objectivity. It would be quite
14 objective to say the two parties that got the most votes
15 in the last election will be the candidates that we'll
16 interview. Will that satisfy you?

17 MR. SHACKELFORD: Your Honor, there has to be
18 two criterias. There has to be first objectivity and the
19 second has to be constitutional. Now, if --

20 QUESTION: Ah, but it's only the latter that
21 we're talking about here. I mean, let --

22 (Laughter.)

23 MR. SHACKELFORD: I think they're both a part of
24 the Constitution, number 1, is the analysis issue, if it's
25 subjective unfettered discretion, that is

1 unconstitutional.

2 QUESTION: Fine, but what do you want besides
3 objectivity? It's not objectivity alone.

4 MR. SHACKELFORD: I -- certainly the standard
5 laid out, again, because we're dealing with sort of a
6 hybrid First Amendment as well as election issues.

7 What this Court has set out saying -- under the
8 ballot access cases saying that a modicum of support is
9 all right, but what you can't do is simply pick a
10 particular party and attempt, as the Government, to
11 entrench those parties and throw out --

12 QUESTION: So you're arguing for a standard.
13 You want us to police these things and determine who has a
14 modicum of support. That's your test.

15 MR. SHACKELFORD: Well, the ballot access -- the
16 ballot access --

17 QUESTION: In Buckley v. Valeo the Court upheld
18 part of the act of Congress that gave special benefits to
19 the Republican and Democratic parties and not to anybody
20 else.

21 MR. SHACKELFORD: Mr. Chief Justice, you're
22 correct, but they did so not on a subjective basis, on the
23 basis of objective standards laid out ahead of time with
24 regard to candidates. Certainly they weren't --

25 QUESTION: Well --

1 MR. SHACKELFORD: Certainly they weren't
2 allowing Government officials to simply look and say we'll
3 give this party this --

4 QUESTION: Well, but they --

5 QUESTION: Well, what if the station had said in
6 advance, we're going to have a debate, we're not including
7 all candidates, we're going to limit it to the selected
8 candidates of the Republican and the Democratic parties,
9 and this is spelled out in advance?

10 MR. SHACKELFORD: Then I think that you have a
11 problem under Williams v. Rhodes and others, where the
12 Government can't pick particular parties. They can use
13 objective criteria that might favor individual parties --

14 QUESTION: Like the ones who qualifies to get
15 public money for campaigns? That's going to leave out
16 some minority candidates.

17 MR. SHACKELFORD: Right. In this case, for
18 instance, if an objective standard was used like how many
19 votes you got for the past elections, Mr. Forbes would
20 qualify. One of his opponents wouldn't but Mr. Forbes
21 would have, but instead of giving him an objective
22 standard he can meet, the only objective standard that was
23 there, he did meet. They simply won't wish that --

24 QUESTION: Well --

25 MR. SHACKELFORD: That's why they ask the Court

1 today for unfettered discretion to simply pick and choose.

2 QUESTION: What about, you know, you have to be
3 the candidate of a party that was one of the first two
4 parties in the last election? That's objective. It
5 doesn't name the Republicans or the Democrats, and it
6 would bump your candidate, wouldn't it?

7 MR. SHACKELFORD: I think this Court's ballot
8 access cases invoke the theory that guarantees the parties
9 some sort of --

10 QUESTION: No, we don't care which one it is.
11 It just has to be one of the first two parties in the last
12 election. It could be the Bull Moose Party as far as
13 we're concerned.

14 (Laughter.)

15 QUESTION: That's the problem with the standard.
16 It is difficult to form a standard. What about following
17 the standard that Congress and the Federal Communications
18 Commission have adopted after thinking about this very
19 problem in trying to come up with a standard that would
20 prevent unreasonable tests?

21 MR. SHACKELFORD: Well, the standard that the
22 Government has actually chosen under the FEC is actually
23 that of preestablished subjective criteria.

24 QUESTION: Well, all right. If in fact, would
25 that be a possible standard? We're concerned about this,

1 the way the Court would be able to -- is to look to the
2 very standard that Congress and the FCC had developed in
3 order to deal with the problem that is under -- existed
4 in Arkansas.

5 MR. SHACKELFORD: Well, obviously we don't think
6 that the Constitution is somehow overridden by the FCC --

7 QUESTION: No, obviously not. The
8 constitutional problem here is to find a standard. What's
9 the objection to going to Congress and having them define
10 a possible standard that as long as it seemed within the
11 realm of reason would work with the Constitution?

12 MR. SHACKELFORD: Well, I think the Court
13 contemplates whatever it wishes to come out with its
14 standard, whatever it determines or interprets to be
15 necessary to be constitutional --

16 QUESTION: If, in fact, we follow the Congress
17 and the congressional FCC standard in the area, how does
18 that affect your model?

19 MR. SHACKELFORD: Well, if we're talking about
20 the FCC, I assume there is no standard. They -- what both
21 Government agencies, the Federal and State said today is
22 they think have unfettered --

23 QUESTION: I'm not -- what I'm driving at is, I
24 thought that Congress perhaps considered the problems of
25 the national tabloids having debates, and how could we

1 have a debate, because if they had to talk to everybody,
2 no matter what, there would be too many people and they
3 couldn't do it.

4 I thought they came up with legislation designed
5 to deal with this? Isn't there a law or an FCC rule that
6 deals with this in the case of national television
7 debates?

8 MR. SHACKELFORD: Not that I'm aware of -- that
9 deals with any FCC criteria of how to pick their
10 candidates. I think they are seeking unfettered editorial
11 discretion of the stations.

12 QUESTION: That's one of the standards. We
13 have a whole universe of choices, I suppose, based on our
14 interpretation of the Constitution.

15 One standard is editorial discretion. Another
16 standard is an elaborate, case-by-case jurisprudence for
17 us to determine what public broadcasting stations must do,
18 and it seems to me the former might be the better.

19 MR. SHACKELFORD: Well, I think that an argument
20 of editorial discretion is simply saying at their
21 discretion, and we're saying whatever standard this Court
22 comes up with, certainly unfettered discretion over the
23 type of constitutional --

24 QUESTION: Well, it isn't unfettered. I think
25 that's unfair on your part. They've tried to set out some

1 guidelines, and I think you're speaking a little too
2 broadly when you say it's unfettered.

3 MR. SHACKELFORD: Let me explain what I mean,
4 Justice O'Connor.

5 Number 1, they conceded in their own brief, and
6 they certainly know this, that their decision was a
7 subjective one. Number 2 --

8 QUESTION: What does the word subjective mean as
9 you're using it now?

10 MR. SHACKELFORD: It means that they were
11 appraising facts, using discretion, coming to conclusions
12 --

13 QUESTION: Well, how else would you plan a
14 broadcast?

15 MR. SHACKELFORD: You could set clearly tangible
16 criteria that -- that where courts of appeals could simply
17 look and see uniform application of a rule whether the
18 candidate met the criteria instead of having to comb
19 through the record --

20 QUESTION: Well, but, you know, you're saying
21 that the public broadcasting stations could do this, and
22 perhaps they could, but does the Constitution require them
23 to do it just to make it easier for a court of appeals to
24 avoid combing through the record?

25 MR. SHACKELFORD: No. I think the Constitution

1 does require them to do it under -- a number of -- even
2 under its licensing cases the Court has said that it
3 cannot vest unfettered discretion in a Government official
4 over speech and this is more critical --

5 QUESTION: Well, okay, but if this is like a
6 licensing case we get entirely apart from the election,
7 then, what about the University of Virginia planning a
8 lecture series on political philosophy?

9 MR. SHACKELFORD: Well, obviously we have a
10 number of different aspects that --

11 QUESTION: Well, but if you once get away from
12 your election context to a license for a speech, which is
13 what you're talking about now, that, too, is in a much
14 different context than broadcasting.

15 MR. SHACKELFORD: We're talking about two
16 different things, I think, probably. Number 1, what we're
17 saying is in a particular and unique forum of candidate
18 debates standardless discretion is not allowed in
19 Government.

20 But second, if we go to the forum analysis,
21 which is what, Mr. Chief Justice, you were referring to,
22 under a forum analysis, again, as this Court has said, not
23 only is the debate a forum, it is what this Court has
24 used to describe what a forum is. The only question
25 therefore really is the limitations of the forum, and I

1 apologize, this is not in the brief. I just finally
2 understood this last night.

3 What the Government is actually doing here is,
4 they are putting as their limit to a limited forum a
5 subjective determination. That allows them to create a
6 forum and then later when particular speakers arise to
7 enter the forum, they use their subjective decisionmaking
8 to exclude them.

9 QUESTION: Well, but what's wrong with what the
10 Government says, and there may be a lot wrong, but they
11 say they may not invidiously discriminate? Now, that
12 takes some of the subjectivity out of it.

13 MR. SHACKELFORD: Well, number 1, I don't know
14 how they can actually say that. AETN is working as a
15 State actor. If they're a State actor, they're not
16 bound -- I mean, they're saying they're a private actor.
17 If they're a private actor they're not bound by the
18 Constitution, they can engage in viewpoint discrimination,
19 they can endorse candidates --

20 QUESTION: Well, let's assume that we think the
21 station is a State actor, all right? Let's make that
22 assumption.

23 MR. SHACKELFORD: Then if they're a State actor
24 what we have is a case that almost exactly fits this
25 Court's case in Southeastern Productions in which

1 Chattanooga created a forum of a theatre. In this case,
2 they created -- the Government created a forum for the
3 debate.

4 Then, the speakers were placed in that theatre.
5 In this case there was -- it was candidates in this
6 debate. Then what happened is, when Hair was drawn in,
7 they said, well, our forum is limited, however. It's
8 limited to plays which are in the best interests of the
9 community. In this case, in the reply brief, the
10 petitioner says our standard was, was it in the best
11 interest of the community?

12 QUESTION: I thought Southeastern Promotions was
13 more of a procedural case than a substantive --

14 MR. SHACKELFORD: It's just a forum analysis,
15 and what they do is, once you realize you're in a real
16 forum, which you are here, the Government cannot come up
17 with this type of discretionless standard that at best,
18 again, unfettered discretion of Government officials,
19 subjective -- what they say is subjective determination.

20 QUESTION: But I take it --

21 QUESTION: Mr. Shackelford, I understand that
22 you're not asking this Court to come up with a code. What
23 you are saying, I thought, was that there must be a set of
24 rules in place, as they are for public financing of
25 campaigns, as there are for standards of who will have

1 access to the town hall, but those standards must be there
2 not for the Court to invent, but for the Court to review
3 for adequacy once they're put in place by --

4 MR. SHACKELFORD: That's what we're saying. At
5 the very first level we know that the Government cannot
6 engage in a subjective determination, picking and choosing
7 amongst the candidates --

8 QUESTION: Okay, but if it had defined public
9 interest, or here, if it had defined viability, or -- I
10 forget what the alternative criterion was here -- would
11 any definition do as long as we know it in advance?

12 MR. SHACKELFORD: No. I think it was a two-
13 step analysis.

14 QUESTION: All right. What's the second step?

15 MR. SHACKELFORD: The first step is objective
16 criteria, and the second step is it has to meet the
17 constitutional safeguards --

18 QUESTION: Yes, but that's the question. What
19 are the constitutional safeguards it's got to meet? What
20 is the substance of the second step?

21 MR. SHACKELFORD: I think with the ballot
22 access. It's probably the closest thing that we have that
23 deals with the election process, and the standards that I
24 see in there are not necessarily bright lines the Court
25 has said, but it's okay to require a modicum of support.

1 It's not okay to simply entrench the major parties and
2 throw out the minority.

3 QUESTION: You use ballot access and it varies
4 widely from State to State, because in some States it's
5 very easy to get on the ballot and in other States it's
6 harder to get on the ballot.

7 MR. SHACKELFORD: I think the interesting thing
8 about ballot access is it's respectful of the people's
9 wishes. They have put forward in their legislature this
10 is what we consider a serious candidate, and to allow
11 another Government agency in that State to say, we don't
12 care what you think is a serious candidate, we're going to
13 exclude your candidate from the debate and confer powerful
14 Government benefits to his opponents --

15 QUESTION: Well, you're really saying that if
16 you have a public -- if you have a ballot access law, that
17 is a good indication of what an objective standard would
18 be, and if you vary from that, you're not perhaps
19 necessarily treading into unconstitutionality, but you're
20 certainly raising a serious question. Is that as far as
21 you go?

22 MR. SHACKELFORD: Certainly ballot access would
23 be sufficient, and in fact that was the only objective
24 standard laid out in this case, and Mr. Forbes met it.

25 QUESTION: -- that is not the reference that I

1 was thinking of. I'm thinking of pages 5 and 6 of the
2 Solicitor General's brief. I'm thinking of the probable
3 problems that arise with the private stations and the
4 equal opportunity requirement. I'm thinking of the FCC's
5 effort to deal with that identical problem in that
6 statutory contest in the private sector, and they've come
7 up with a set of workable rules, I take it, for the
8 identical problem which is described here as, if you'll
9 recognize an exemption, i.e., for the comparable -- only
10 your broadcasting decisions rest on a reasonably good
11 faith journalistic effort.

12 MR. SHACKELFORD: Your Honor --

13 QUESTION: Yes, yes. What I want to know is,
14 why wouldn't that work?

15 MR. SHACKELFORD: Number 1, the FCC standards
16 are there in private and public broadcasting, so it
17 wouldn't be something -- it wouldn't be --

18 QUESTION: Well obviously you won't even have
19 that FCC effort to deal with this very problem, why is
20 that effort not constitutional, moving it into our
21 constitutional province?

22 MR. SHACKELFORD: Number 1, because the idea
23 that an individual can exercise their First Amendment
24 rights in a different place at a different time has never
25 been held as a sufficient basis for denying their rights

1 and ignoring the law. For instance, that argument, if it
2 were used in Brown versus Board of Education, would tell
3 African-American parents they can go to a private school.

4 In this case, the forum was a debate. The speaker
5 cannot be excluded on the basis that they could speak at
6 some other time, some other place. It's certainly not
7 sufficient under the Constitution. Southeastern
8 Productions says this --

9 QUESTION: Well, maybe the fact too that the FCC
10 isn't authorize to fill in blanks in the Constitution.

11 QUESTION: Well, they have a comparable problem.
12 They have a statute which imposes the same kind of
13 obligation on a private person as the Constitution imposes
14 on a public person. To deal with that problem they come
15 up with workable standards.

16 MR. SHACKELFORD: They might be workable, but we
17 say they're certainly not constitutional --

18 QUESTION: So you're saying that if the FCC
19 rules in a public contest it's a constitutional --

20 MR. SHACKELFORD: Right. Certainly what they
21 have here is not sufficient for Government broadcasting.
22 The FCC has made clear its approach is to give unfettered
23 discretion to all of its broadcasters, and so essentially
24 what we have in the question is -- and I think the context
25 we have is, a broadcasting industry is a Government

1 monopoly which is run by the FCC. Two-thirds of the
2 licenses given out are given out to Government licensees.

3 QUESTION: But I'm concerned that what you're
4 asking in this case is for us to confine editorial
5 discretion in a corporate broadcasting station, and I
6 suppose you'd be quite satisfied, because you could win
7 your case, if we said that we will confine that discretion
8 when elections are involved.

9 MR. SHACKELFORD: I think --

10 QUESTION: But I'm not sure if there is a
11 principled line in our precedent that will allow us to
12 make that conclusion, or you to make that argument.

13 MR. SHACKELFORD: I think there is, in that
14 there are aspects in this particularized forum that do not
15 exist in any other forum, and therefore it has to
16 extrapolate from this type of forum to a forum that does
17 involve elections, that does involve candidates. We
18 would be in a completely different analysis -- it may
19 involve speech elements, but it wouldn't involve other
20 voter's rights elements.

21 QUESTION: And yet in one sense editorial
22 discretion is most important when we are involved with
23 elections.

24 MR. SHACKELFORD: Well, certainly not in
25 Government editorial discretion, in the way it interposes

1 itself into the election process, possibly skews the
2 debates.

3 For instance, excluding minority candidates has
4 more than one effect. Maybe that minority candidate is
5 going to be our Congressman in 2 months. Maybe they're
6 going to change the election as well for some of the other
7 candidates, or I think the most important, maybe the ideas
8 they express are going to be the ones around which the
9 entire campaign is focused.

10 So if we allow this type of discretion in
11 excluding minority candidates, it will be a direct attack
12 on the whole idea of --

13 QUESTION: You know, except that I think at the
14 same time you are agreeing that if the Government station
15 decides instead of having a debate simply to have an
16 interview by its political news anchor, it can choose to
17 interview anyone it wants to. Is that your position?

18 MR. SHACKELFORD: It's certainly a far step away
19 from our case.

20 QUESTION: But what's the answer to my question?
21 On your theory, is that allowed?

22 MR. SHACKELFORD: I think it would depend upon
23 the facts. If what we have --

24 QUESTION: Well, what facts would be
25 significant?

1 MR. SHACKELFORD: I think number 1, whether
2 there's a case for a face-to-face candidate discussion
3 going on, that will bring out that answer --

4 QUESTION: So what you're really saying is, the
5 Government up to a point sets its own terms. If the
6 Government says, we're going to bring people before you so
7 that you can hear them, then they are bound by something
8 like forum analysis. If they don't say that, and they
9 say, in essence, we're going to bring people before you
10 whom we like, we endorse, it's not bound by forum
11 analysis?

12 MR. SHACKELFORD: Well, I don't know whether
13 bound by --

14 QUESTION: Is that a fair characterization of
15 what you're saying?

16 MR. SHACKELFORD: What I'm saying is, there's a
17 line, and I don't know that I can draw the line exactly
18 between when it leaves Government speech and becomes a
19 nonpublic forum.

20 I think when they begin to involve private
21 speakers, that is the first time the First Amendment might
22 begin to come into play, but certainly when they get as
23 far across the line as they are in the current case, with
24 a candidate-Government debate, it is very clearly a
25 limited public forum, and I don't think there will be any

1 question about that.

2 QUESTION: Mr. Shackelford, suppose the Court
3 were to determine that the standards that Ms -- whatever,
4 that those were all okay standards, the problem was that
5 she made them up, or came up with them after, and that
6 under those standards your candidate would flunk, so
7 you're in this at this point for the money because the
8 election is long over, would you be entitled to any relief
9 if the standards that she announced are okay, the only
10 problem with them was that they weren't in place when your
11 candidate asked to be part of the debate?

12 MR. SHACKELFORD: I think we would still be
13 entitled to relief. Because, a good example was the
14 Southeastern Productions case. In that case, the play had
15 already been declared obscene in a criminal action, and
16 so, but then the Court didn't even get to that issue.
17 What they said was, use of unfettered discretion itself is
18 enough of a constitutional violation.

19 QUESTION: Thank you, Mr. Shackelford.

20 Mr. Marks, you have 2 minutes remaining.

21 REBUTTAL ARGUMENT OF RICHARD D. MARKS

22 ON BEHALF OF THE PETITIONER

23 MR. MARKS: Mr. Chief Justice, and may it please
24 the Court:

25 Ballot qualification is, is an arbitrary

1 standard. It's both over-and under-inclusive, and it
2 simply wouldn't work. That's why editorial judgment is an
3 essential element in this enterprise. You can't run a
4 news organization without engaging in editorial
5 discretion.

6 QUESTION: How about standards like for public
7 financing?

8 MR. MARKS: I think, Your Honor, that the public
9 financing standards that the FC, the FEC, Federal
10 Elections Commission has asked for, even though their
11 objectives are --

12 QUESTION: Is editorial discretion -- can it be
13 subject to objective standards?

14 MR. MARKS: No, Your Honor, it can't. It has
15 to -- the problem, Justice Ginsburg with your -- with
16 relying on Federal Election Commission standards, because
17 any time there's a list of standards, there's going to be
18 a weighing and balancing, and it will be subject to some
19 subjectivity in that mix.

20 QUESTION: But don't you think that there's a
21 guarantee present when you see the list, and you say,
22 okay, I have to meet this list, then when there is no
23 list, and then after they turn you down they say, these
24 are the reasons?

25 MR. MARKS: No, Your Honor, I don't. This is

1 not an algorithm, and using the newsworthiness standard
2 there's always an opportunity, if somebody doesn't want to
3 use the newsworthiness standard, wants to discriminate,
4 there's always opportunity to manipulate those factors.

5 In fact, in answer to Justice Breyer's question
6 about the FCC's standards that have been quoted here,
7 because those standards in fact in the second prong of the
8 test for an exemption forbid viewpoint discrimination.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Marks.
10 The case is submitted.

11 (Whereupon, at 11:03 a.m., the case in the
12 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

ARKANSAS EDUCATIONAL TELEVISION COMMISSION, Petitioner v. RALPH P. FORBES

CASE NO: 96-779

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Federico

(REPORTER)