

# **Election Day Litigation**

***Edward B. Foley***

***Director, Election Law @ Moritz***

***Robert M. Duncan/JonesDay Designated Professor***

***Moritz College of Law, The Ohio State University***

***<http://moritzlaw.osu.edu/electionlaw>***

# General Considerations

- More use of litigation as tool to win elections.
- Will court's decision be seen as impartial?
- Can state's election officials handle the matter?
- Balancing the equities: will intervention or non-intervention do more to impair the validity and integrity of the election?
- Is the particular issue one that should have been raised before Election Day?
- Is the issue better handled after Election Day?

# Types of Election Day Litigation:

- Polling Places: Media/Observer Access.
- Challenges to Voter Eligibility.
- Breaches of Ballot Security Procedures.
- Extending Polling Place Hours.

# Media and Observer Access to Polling Places

- U.S. Supreme Court: *Burson v. Freeman*, 504 U.S. 191 (1992).
- Media exception to *Burson*.
- Non-partisan observer group exception?

# *Burson v. Freeman* (1992)

- State law: no campaigning w/in 100 ft. of polling place entrance.
- 5-3 (really 4-1-3) decision: no Free Speech violation.
- Plurality: Blackmun, Rehnquist, White, *Kennedy*; Concurrence: *Scalia*.
- Dissent: *Stevens*, O'Connor, *Souter*
- Unknown: *Roberts*, *Thomas*, *Ginsburg*, *Breyer*, *Alito*.

# Reasoning in *Burson v. Freeman*

- Plurality: ban satisfies strict scrutiny b/c necessary to protect voters from harassment.
  - No need for state to justify 100 ft rather than 25 ft.
  - No need to ban non-harassing speech at polls.
- Scalia: no need for strict scrutiny b/c polling places are not “public forums” for 1<sup>st</sup> Amend.
- Dissent: 100-ft. ban far too broad; selective ban on campaigning, but not exit polling or other election-related speech, is discriminatory.

# Media exception to *Burson*

- First Amendment: press must have access to polling places to observe elections and conduct exit polls.
- *Beacon Journal Publishing v. Blackwell* (6th Cir. 2004).
  - Ohio law: no person can enter polling place except to vote.
  - Appeals court, on Election Day, reversed denial of TRO; permitted press to observe elections.

# Media Exception to *Burson*

- “Far from interfering with the right to vote,” media’s purpose is to inform the public concerning the voting process.
- “Democracies die behind closed doors”.
- Secrecy of casting ballot; but visibility of voting procedures.
- Similar recent decisions to permit exit polling.



# Non-partisan Observer exception?

- International observers or League of Women Voters.
- “Voter Protection” groups may favor one party.
- States may limit # of non-voters at polling places.
- States may ban campaigning, soliciting, or other potentially harassing activities.

# Non-partisan Observer exception?

- If state permits press, debatable whether it must also permit limited # of non-press observers.
  - Difficulties in distinguishing press from non-press.
  - 1<sup>st</sup> Amen. right to observe elections tied to reporting obligation.
  - Fair procedure for obtaining “press pass” credentials.

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