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Recent Developments: *Burson v. Freeman*: Statute Prohibiting the Display and Distribution of Campaign Materials within 100 Feet of a Polling Place Does Not Violate the First and Fourteenth Amendments

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1969 Act preempted the failure to warn actions to the extent they relied on a showing that manufacturers should have had additional warnings. *Id.* at 2621-22. The Court, however, noted that the 1969 Act did not preempt the petitioner's failure to warn claims that relied solely on the manufacturers' research or testing practices or other actions unrelated to advertising. *Id.* at 2622.

The Court next addressed the petitioner's claim for breach of express warranty. *Id.* Noting that an express warranty is not a requirement imposed under state law but is a voluntary undertaking by the manufacturer/warrantor, the Court stated that a claim for breach of warranty was not preempted by the 1969 Act. *Id.* at 2622-23.

Turning to the petitioner's allegations of fraudulent misrepresentation, the Court first analyzed the claim that the manufacturers' advertising counteracted the effect of the federal warning labels. *Id.* at 2623. The Court stated that because section 5 of the 1969 Act preempted state law prohibitions as well as requirements, the petitioner's claims based on state law prohibitions against advertising that minimized the hazards of smoking was preempted by the 1969 Act. *Id.* In addressing the petitioner's second fraudulent misrepresentation claim based on allegations that the manufacturers intentionally concealed material facts about the hazards of smoking, the Court noted that the petitioner's actions were not predicated on a duty under the 1969 Act but rather on a general duty not to deceive. *Id.* at 2624. Thus, the Court found that the petitioner's claims based on fraud in advertising were not preempted by the 1969 Act. *Id.*

Finally, the Court examined the petitioner's claim of conspiracy to misrepresent. *Id.* The Court found that the conspiracy claim was not preempted because the underlying duty in such a claim was a duty not to conspire to commit fraud, rather than a duty imposed by the 1969 Act. *Id.* at 2624-25.

Justice Blackmun, after joining the majority in the opinion regarding the

1965 Act, wrote separately for three justices and concluded that none of the petitioner's claims were preempted by the 1969 Act. *Id.* at 2625-26. Thus, Blackmun concurred only in the judgment that certain claims based on failure to warn, fraudulent misrepresentation, express warranty and conspiracy were not preempted by the 1965 Act. *Id.* Justice Scalia, joined by Justice Thomas, concluded that the 1965 Act preempted petitioner's failure to warn claims and that the 1969 Act preempted all of the petitioner's common law claims under the ordinary meaning of the statutory language. *Id.* at 2632. Consequently, Justice Scalia concurred only in the part of the judgment that held that the petitioner's failure to warn and fraudulent misrepresentation claims were preempted. *Id.* at 2637.

In *Cipollone*, the Supreme Court held that under certain circumstances, cigarette manufacturers can be held liable for the health problems of smokers, notwithstanding the existence of warning labels on cigarette packages. Although the ruling bars claims that advertising and labeling did not adequately warn smokers of the health hazards of smoking, it allows claims alleging misrepresentation, breach of express warranty, conspiracy, and fraud as well as certain failure to warn claims. This decision may provoke thousands of new suits filed by smokers against tobacco companies. More significantly, *Cipollone* may have set a precedent to allow consumers to bring suit in cases involving any product regulated by the federal government, including over-the-counter medications and alcoholic beverages, in which manufacturers may have hidden or misrepresented possible side effects of their products to the public.

-Ellen Ann Marth

***Burson v. Freeman*: STATUTE PROHIBITING THE DISPLAY AND DISTRIBUTION OF CAMPAIGN MATERIALS WITHIN 100 FEET OF A POLLING PLACE DOES NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS.**

The Supreme Court affirmed the validity of a longstanding tradition of regulating campaign related speech in the areas surrounding a polling place. In *Burson v. Freeman*, 112 S. Ct. 1846 (1992), a plurality of the Court held that a Tennessee law establishing a 100-foot campaign free zone satisfied a strict scrutiny analysis because it was necessary to serve a compelling state interest and was narrowly drawn to achieve that end. This opinion may prove to be more important because the substance of the statute, which regulated expressive conduct near a polling place, was upheld by only a plurality of the Court.

Respondent, Mary Rebecca Freeman ("Freeman"), filed suit in the Chancery Court while working as treasurer for a political campaign in Tennessee. Freeman alleged that section 2-7-111(b) of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign material within 100 feet of a polling place, unconstitutionally restricted her ability to communicate with voters in violation of her rights under the First and Fourteenth Amendments to the United States Constitution. The court dismissed her suit, finding that the law was not in violation of either the Tennessee or the United States Constitutions. The Tennessee Supreme Court reversed, reasoning that the State had a compelling interest in banning such activities inside the polling place but not in the area surrounding it. The court concluded that the law was not narrowly drawn and that it did not represent the least restrictive means available to protect the State's interest. The United States Supreme Court granted certiorari, reversed, and upheld the Tennessee statute because it

satisfied strict scrutiny.

The Court began its analysis by noting that the First Amendment prohibits Congress from passing any law abridging a person's right to freedom of speech. *Id.* at 1849-50. The Court recognized that "[t]he Tennessee statute implicates three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech." *Id.* at 1850. Addressing the last issue, the Court asserted that content-based restriction must be subjected to strict scrutiny. *Id.* at 1851. Thus, the State was required to show that the regulation was necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end. *Id.* (citing *Perry Education Assn. v. Perry Loan Educators' Assn.*, 460 U.S. 37, 45 (1983)).

The State asserted that section 2-7-111(b) furthered Tennessee's compelling interest in protecting each citizen's right to vote freely and in maintaining the integrity and reliability of the election. *Burson*, 112 S. Ct. at 1851. The Court agreed that these concerns represented compelling state interests. *Id.* at 1851-52. The Court opined, however, that in order for a statute to satisfy strict scrutiny the State must show that the law is necessary to serve the asserted interest. *Id.* at 1852. The Court looked to the history of election reform and concluded that regulations concerning conduct around polling places were necessary to maintain secrecy and to prevent bribery and intimidation in the voting process. *Id.* Thus, the Court concluded that the wide spread and longstanding practice of imposing restricted zones around polling places substantiated the necessity for the Tennessee statute. *Id.*

Freeman advanced three arguments in opposition to this conclusion. First, he argued that the statute was overinclusive because the State could protect its interests through statutes that would make it a misdemeanor to interfere with voting. *Id.* at 1855. The

Court ruled, however, that such statutes would not be effective because they would address only the most blatant acts. *Id.* Second, Freeman argued that the statute was underinclusive because it did not regulate all speech. *Id.* The Court responded that this was not a valid objection because "[t]he First Amendment does not require States to regulate for problems that do not exist." *Id.* at 1856. Through this assertion the Court established that states do not have an obligation to restrict conduct that is not harmful. Finally, Freeman argued that the Court confused history with necessity, but the Court held that the only way to preserve secrecy in voting was to limit access to the voting area. *Id.*

In determining that the statute was narrowly drawn, the Court held that a State is not required to empirically show that the zone established in the statute is perfectly tailored to serve the state interest. *Id.* The plurality reasoned that because similar laws date back to the 1890's, it would be very difficult for the State to present evidence concerning what would happen without them. *Id.* The Court noted that it would be similarly difficult to isolate the effect such a statute has on preventing voter intimidation and fraud because successful intimidation and fraud is often undetected. *Id.* Thus, the Court held that a state legislature should be permitted to respond to potential difficulties so long as it does not significantly impinge upon constitutionally protected rights. *Id.* at 1856-57 (quoting *Monroe v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)). The Court then opined that a 100-foot boundary represented a "minor geographic limitation," and, therefore, did not significantly impinge on the right to free speech. *Burson*, 112 S. Ct. at 1857.

Justice Scalia filed an opinion concurring in judgment. He concluded that the law, although admittedly content-based, was constitutional because it was a "reasonable, viewpoint-neutral regulation of a non-public forum."

Id. at 1859. Contrary to the opinion of the plurality, Justice Scalia reasoned that similar statutes restricting activities on street and sidewalks surrounding polling places have been widely used since the late 19th century, and that these areas traditionally have not been devoted to assembly and debate and cannot be categorized as a public forum. *Id.* at 1860. Therefore, statutes such as Tennessee's need only be reasonable and viewpoint-neutral and need not be subjected to strict scrutiny. *Id.* (citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)). Adopting the plurality's rationale in reaching the conclusion that the statute satisfied strict scrutiny, Scalia asserted that the statute was reasonable and, because Freeman did not contend that it was viewpoint-discriminatory, he found it to be constitutional.

Justices O'Connor and Souter joined Justice Stevens' dissent, asserting that the State failed to show that the campaign-free zone law was necessary to protect a compelling state interest and that the statute was narrowly drawn. The dissent first contended that the statute was unconstitutionally overbroad. *Id.* at 1861. Stevens noted that the Tennessee regulated zone encompassed at least 30,000 square feet around each polling facility, but other states have no problem maintaining the integrity of elections by imposing campaign free zones of 50 feet or less. *Id.* In addition, the dissent argued that the statute prohibits legitimate expressive conduct such as wearing a campaign pin. *Id.* at 1862. Also the dissent asserted that the State had no basis for restricting political expression outside the polling place because a witness for the state could only establish a rationale for restrictions inside the facility. *Id.*

The dissent also charged the plurality with confusing history with necessity. *Id.* Arguing that custom developed through tradition will not always remain necessary, the dissent asserted that moderns election are far less corrupt than those of 100 years ago. *Id.* at

1863. The dissent, therefore, concluded that it was no longer necessary to enforce sweeping suppression of political speech subject to the protection of the First Amendment.

In addition to overbreadth, the dissent noted that the statute discriminated in its regulation of speech. The dissent asserted that the plurality failed to inquire whether this discrimination was related to the purported state interest. *Id.* at 1864. The dissent opined that the State did not isolate any legitimate state interest justifying the selective prohibition because the same evil can result from unrestricted conduct. *Id.* at 1865.

Finally, the dissent argued that the plurality's opinion represents a departure from the "strict scrutiny" standard. *Id.* First, the Court replaced the requirement of a showing of "necessity" with the need to show longstanding tradition. *Id.* Second, the Court modified the requirement of "narrowly drawn" by granting the State broad power to legislate in a prospective manner in an effort to respond to possible future difficulties. *Id.* Third, the dissent noted that if the State no longer needs to show that other expressive conduct does not pose the same danger, it no longer has the burden of showing justification for the law. *Id.* at 1866. The dissent thus concluded that the presence of campaign workers outside a polling place was not more than a minor nuisance and that there was no justification for suppressing their freedom of speech. *Id.* at 1866-67.

By its ruling in *Burson*, the Supreme Court perpetuates the longstanding tradition of allowing a state to regulate the areas surrounding a polling facility on election day. However, because this is only a plurality decision, with a strong dissent, this ruling may represent a departure from this tradition. In addition, *Burson v. Freeman* is significant because it holds that the right to freely cast a ballot in an election is a fundamental right which justifies limiting an individual's right to freedom of speech.

- Julie Buchwald

Jacobson v. United States: ENTRAPMENT DEFENSE PREVAILED WHERE GOVERNMENT FAILED TO PROVE CRIMINAL PREDISPOSITION EXISTED BEFORE INVESTIGATION INDUCED DEFENDANT TO BREAK THE LAW.

In *Jacobson v. United States*, 112 S. Ct. 1535 (1992), the United States Supreme Court held that once the defense of entrapment is asserted, the government must establish that a criminal defendant's independent predisposition to commit the crime for which he was arrested existed before the initiation of a government investigation into the matter. The Court concluded that as a matter of law the prosecution failed to generate sufficient evidence to support a jury verdict that the defendant possessed the requisite prior criminal disposition beyond a reasonable doubt.

In 1984, Nebraska farmer Keith Jacobson ordered magazines containing photos of nude teen and preteen boys from an adult bookstore in California. Jacobson legally received these publications and he maintained that he expected them to include pictures of young men, eighteen years of age or older. Congress subsequently passed the Child Protection Act of 1984, 18 U.S.C. § 2252 (1984), which made the receipt of sexually explicit pictures of children through the mail illegal. In an effort to enforce the new law and to target potential offenders, government officials obtained Jacobson's name from the mailing list of the California bookstore.

Under the guise of promoting sexual freedom and freedom of choice, federal law enforcement agents posed as representatives of various lobbying organizations, seeking responses to several questionnaires and surveys in an attempt to determine Jacobson's sexual preferences and propensity to violate the law. From these correspondences, the Government succeeded in eliciting an indication of his interest in preteen homosexual materials, but uncovered no other evidence that Jacobson

had intentionally possessed child pornography in contravention of the law.

After continuing its mailings over a period of twenty-six months, the Government sent letters to Jacobson from fictitious companies which decried censorship and the hysteria concerning pornography. The letters also invited him to request more information about ordering materials depicting young boys engaged in various sexual activities. Jacobson responded to these correspondences and received brochures from the bogus companies. Although he never received the materials he had ordered from the first mailing, Jacobson was arrested after a controlled delivery of his second catalogue order of a publication containing sexually explicit photographs of young males.

Jacobson was indicted in the United States District Court for the District of Nebraska for violating the Child Protection Act. In a search of his home, the Government found no materials related to child pornography except the two original legally ordered magazines and the correspondences sent by law enforcement agents during their investigation. At trial, Jacobson testified that he ordered the magazines because the Government had succeeded in arousing his curiosity. Although the jury was instructed on the defense of entrapment, Jacobson was convicted. On appeal, the United States Court of Appeals for the Eighth Circuit, sitting *en banc*, affirmed the lower court's decision and concluded that Jacobson was not entrapped as a matter of law. The Supreme Court thereafter granted certiorari to review the issue of entrapment.

The Court began its analysis by recognizing that the Government in its law enforcement capacity may afford an opportunity for the commission of an offense. *Jacobson*, 112 S. Ct. at 1540. It may not, however, employ its agents to instill in an innocent person's mind the inclination to commit a crime, and then induce a criminal act in order to prosecute. *Id.* The Court concluded that where Government agents have