IN THE SUPREME COURT OF THE STATE OF FLORIDA

GEORGE FIRESTONE, et al.,

Appellant,

vs.

NEWS-PRESS PUBLISHING CO., INC.,
d/b/a FORT MYERS NEWS-PRESS,

Appellees.

Consolidated Case Nos. 72,814
72,789

APPEAL FROM THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE STATE ASSOCIATION OF SUPERVISORS OF ELECTIONS, INC.

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STATEMENT OF THE CASE

Amicus Curiae, State Association of Supervisors of Elections, Inc., adopts the Statement of the Case of Appellant George Firestone in his able brief.

INTEREST OF AMICUS CURIAE

Amicus Curiae, State Association of Supervisors of Elections, Inc., is an association of the 66 elected and one (Dade County) appointed Supervisors of Elections of the State of Florida. Supervisors of Elections are responsible for the conduct of Special and General elections in Florida, and along with the Clerks and Inspectors appointed by the Supervisors are responsible for assuring that voters have an unfettered right to cast a secret ballot. As such, this controversy as to the rights of the press versus the right of the voter to be free from interference while casting a secret ballot are of great concern to Florida's election officials.

PREFACE

News-Press as used herein refers to News-Press Publishing Company, Inc., and Amicus Curiae supporting its position.

First Amendment as used herein refers to the First Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

Section 101.121 Florida Statutes grants poll access only to voters exercising the voting franchise. The statute does not abridge First Amendment rights on its face and News-Press does not claim it does. The effect on First Amendment rights is strictly incidental and so the statute is reviewed under a standard less stringent than that applied to content-based restrictions. If the statute furthers a legitimate state interest, the courts should not strike it down on the basis of an improper legislative motive.

If access to the area surrounding the polls may be constitutionally denied to the nonvoting public, it may also be denied to the nonvoting press. Even if the press asserts a special right to access as the representative of the public based on a tradition of public access, its argument must fail because Florida law has no tradition of public access to the polls.

The State has a compelling interest in assuring the factual and apparent integrity of the election process. When furthering this interest through legislation only incidentally restricting First Amendment rights, the State is not required to prove the necessity for the regulation but may act to limit circumstances where a threat of impropriety exists.

The Legislature has determined that the integrity of the election process, both factual and apparent, is best protected by limiting access to the polls to voters only. A regulation effecting this purpose cannot be more narrowly drawn.

ARGUMENT

I. THE STATUTE HERE CHALLENGED DOES NOT AFFECT FIRST AMENDMENT RIGHTS EXCEPT INCIDENTALLY AND THEREFORE IS REVIEWED UNDER THE O'BRIEN STANDARD.

The Statute establishes a fifty-foot zone around a polling place, excepting businesses and private property, where only voters and election officials may enter. §101.121, Fla. Stat. (1985). It means nothing more. However, the statute incidentally denies all nonvoters, including News-Press, the opportunity to exercise First Amendment rights within the fifty foot zone when the polls are open. Reporters from the News-Press are excluded only if they are not at the polling place. The Statute does not on its face regulate more than access to a strictly limited area for a strictly limited time, for a strictly limited purpose, and therefore does not directly implicate First Amendment rights.

News-Press does have a limited First Amendment right to gather news. E.g., Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Unquestionably, the statute will prevent News-Press from entering the polls to report on the balloting and thereby limit the scope of that reporting.[1] Therefore, News-Press may challenge the statute on First Amendment grounds as it is applied to their particular activities. City Council v. Taxpayers For Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772, 785 (1984).

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[1]The District Court below considered the effect of the Statute on the general nonvoting public, not exercising First Amendment rights, in finding the Statute "overbroad". 13 F.L.W. 1085 (Fla. 2d DCA May 13, 1988). It is respectfully submitted that the nonvoting public not engage in First Amendment activities would have no standing to challenge the Statute on First Amendment grounds. By definition, only those parties seeking to exercise First Amendment rights may so challenge the Statute.

Over the last few years the United States Supreme Court has used two approaches when reviewing government regulations which affect First Amendment rights. "Content-based" regulations receive the highest scrutiny while "content-neutral" regulations are reviewed under a relaxed standard. Boos v. Barry, __U.S.__, 108 S.Ct. 1157, 99 L.Ed.2d, 333, 343-45, (1988); Clark v. Community For Creative Nonviolence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221, 239, (1984) (Marshall dissenting). "Content-based" restrictions are those which purport to regulate First Amendment activities while "'content-neutral' speech restrictions [are] those which 'are justified without reference to the content of the regulated speech.' Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 711, [48 L.Ed.2d 346, 96 S.Ct. 1817] (1976)" Boos, 99 L.Ed.2d at 343-44 [Quoting Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, (1986)]. The statute here challenged regulates access by discriminating between voters and nonvoters without reference to speech or press rights. §101.121, Fla. Stat. (1985). As stated in Taxpayers For Vincent, "The text of the ordinance is neutral—indeed it is silent...."[2] Taxpayers For Vincent, 80 L.Ed.2d at 786-7. Section 101.121, Florida Statutes does not address speech or the press, and therefore, must be reviewed under the standard established in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, Reh. Denied, 393 U.S. 900, 89 S.Ct. 63, 21 L.Ed.2d 188, (1968); Taxpayers For Vincent, 80 L.Ed.2d at 787; See Also, Arcara v. Cloud Books, Inc., 478 U.S._____, 106 S.Ct. 3172, 92 L.Ed.2d 568, 575, (1986); Clark v. Community For Creative Nonviolence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221, 227, (1984).

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[2]In Taxpayers For Vincent, the ordinance prohibited the placing of signs on utility poles and was challenged by a political committee who wished to place campaign posters on those poles. The Court upheld the ordinance. Taxpayers For Vincent, 80 L.Ed.2d 772.

II. SECTION 101.121, FLORIDA STATUTES MEETS THE O'BRIEN TEST OF CONSTITUTIONALITY.

In O'Brien the defendant burned his draft card as a protest against the Vietnam War and was charged and convicted for his act under a law making the knowing destruction of the draft card a crime. O'Brien, 20 L.Ed.2d at 675-76. O'Brien challenged the law on the grounds that his act was symbolic speech protected under the First Amendment. Id. 20 L.Ed.2d at 696. The Court held that the law regulated "conduct having no connection with speech" but assumed that there was an incidental effect. Id., 20 L.Ed.2d at 679. The Court then stated that the law would pass constitutional muster if:

1. It is within the power of congress to regulate the activity;
2. The law furthers an important or substantial government interest;
3. The interest is unrelated to free speech; and
4. The restriction goes no farther than necessary to protect that interest.

O'Brien, 20 L.Ed.2d at 679-80[3].

A. THE STATUTE MEETS THE FIRST TWO PARTS OF THE O'BRIEN TEST.

The first two elements of the O'Brien test are easily met. The Florida Legislature undeniably has the power to regulate the election and voting processes. E.g., Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, 692 (1976); Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732, 740 (1982); News-Press Publishing Co., Inc. v. Firestone, 13 F.L.W. 1085 (Fla. 2d DCA May 13, 1988). The state's interest is certainly

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[3]Furthermore, the Court stated that it would not strike down the law on the basis of an improper legislative motive. O'Brien, 20 L.Ed.2d at 683-84. News-Press alleged at trial that the Florida Legislature intended to limit the effectiveness of exit polling by the press.

important or substantial. News-Press Publishing Co, Inc. v. Firestone, 13 F.L.W. 1085 (Fla. 2d DCA May 13, 1988)(Government interest is compelling).

B. THE STATUTE MEETS THE "UNRELATEDNESS" PRONG OF THE O'BRIEN TEST

The Statute regulates access only and does not by any of its terms purport to restrict First Amendment rights. §101.121, Fla. Stat. (1985). The Statute is justified only by the Florida Legislature's compelling interest in maintaining the appearance of fair, honest, and orderly elections. Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, 692 (1976); Winn-Dixie Stores, Inc. v. State, 408 So.2d 211, 212 (Fla. 1982) [Quoting Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980) acknowledging that prevention of either "actual or apparent corruption" of candidates could be a compelling interest]. This statute does not facially restrict First Amendment activities as did §104.36, Florida Statutes declared unconstitutional in Clean-Up '84 v. Heinrich, 759 F.2d 1511 (11th Cir. 1985) (statute restricted solicitation of signatures for petitions). It does not ban the wearing of armbands regarded as symbolic speech like the regulation declared unconstitutional in Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Neither does the Statute comprehensively and expressly ban all First Amendment activities in airport areas open to the general public as held unconstitutional in Board Of Airport Commissioners Of Los Angeles v. Jews For Jesus, 55 U.S.L.W. 4855 (June 15, 1987). This Statute constitutes little more than a law limiting access, analogous to, but more limited in scope, than the trespass law upheld in Adderley v Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). As stated in Adderley, "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated" regardless of the intent of private parties to utilize the property for First Amendment purposes. Id., 17

L.Ed.2d at 156. Unless the Statute by its terms restricts First Amendment rights, it cannot be said to be related to the exercise of those rights absent a hidden legislative motive.

Even an "illicit legislative motive" is irrelevant to the constitutionality of the Statute unless the "inevitable effect" of the Statute denies News-Press its constitutional rights. United States v O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, 684-85 (1968). An argument that the Statute "inevitably" denies News-Press' constitutional rights necessarily assumes that a First Amendment right of access to the polls exists to be violated. This right of access depends in turn on the public's right of access for those purposes because the Constitution does not give the press rights of access superior to that of the public. Houchins v. KQED, Inc., 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553, 562-63, (1978); Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). When the press acts as the representative of the public a two prong test determines whether access must be granted as a matter of constitutional law. Press-Enterprise Co. v. Superior Court, 478 U.S. __, 106 S.Ct. 2375, 92 L.Ed.2d 1, 10 (1986). The first prong requires that the place and process to which access is sought have been historically open to the press and public. Id. The second prong requires that public access play a "significant, positive role" in the function of the particular process. Id. In Florida, polling places have not been open to the nonvoting public since 1895[4]. See, §39, Ch. 4328, Laws of Fla. (1895). Therefore, News-Press' asserted right fails the first prong of

[4]The press has been allowed access to the polls by individual supervisors of elections in the past, but this does not support a conclusion that press access is protected as a constitutional matter. The United States Supreme Court considered whether a historical pattern of press access to California prisons superior to that of the general public would preclude abridgment of that historical right. Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495, 506-07 (1974). The Court held the regulation limiting the press' right of access valid because it was a privilege not a constitutional right. Id.

the Press-Enterprise test and it can not be said that the Statute "inevitably" denies News-Press constitutional rights. As enacted the Statute is sufficiently "unrelated" to First Amendment rights to meet the third prong of the O'Brien test.

C. THE BAN OF ALL NONVOTERS FROM THE POLL IS A REGULATION CLOSELY TAILORED TO THE STATE'S POSSESSIVE LEGITIMATE INTEREST IN MAINTAINING THE APPEARANCE OF ELECTORAL PROPRIETY.

The fourth prong of the O'Brien considers whether the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 20 L.Ed.2d at 680. The District Court below, applying a least restrictive means test under the higher standard of review reserved for content-based restrictions, held that the State's interest in insuring secrecy of the ballot and orderly elections could be served by means less inimical to First Amendment rights. News-Press Publishing Co., Inc. v. Firestone, 13 F.L.W. 1085 (Fla. 2d DCA May 13, 1988). The District Court's holding necessarily depends on the assumption that the State's legitimate interests do not include an interest in maintaining the appearance of fair, honest, and orderly elections. An interest which is arguably compelling. See, Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, 692 (1976); Winn-Dixie Stores, Inc. v. State, 408 So.2d 211, 212 (Fla. 1982) [Quoting Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980) acknowledging that prevention of either "actual or apparent corruption" of candidates could be a compelling interest]. The District Court also failed to consider what legitimate motives the Legislature might have which justify the total ban of nonvoters from the poll. For example: Consider the effect on black voters of a small group of white blue-collar males standing in the predominantly black Dade Street Community Center Precinct in Tallahassee on election day, or the same group standing on the sidewalk outside the poll. How would the State prove the group intended to intimidate black voters?

The District Court's solution to the "no greater than essential" problem envisions a comprehensive scheme of laws prohibiting specific conduct without infringing First Amendment rights. The network of laws thereby created would necessarily include First Amendment exceptions to the network's general rule. However, as stated by the United States Supreme Court in Taxpayers For Vincent, "To create an exception for appellees' political speech and not those other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." City Council v. Taxpayers For Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772, 794 (1984).

The Florida Legislature determined that the State's interest in the appearance of fair, open, honest elections required that nonvoters be excluded from the polling place. §101.121, Fla. Stat. (1985). When legislative bodies make the determination that a potential for abuse of the election process exists, it may take steps to minimize these risks by altering the circumstances which create or contribute to that potential. Buckley v. Valeo, 46 L.Ed.2d at 694. The Legislature concluded that allowing nonvoters in the poll creates the potential for abuse of the election process, therefore, a law restricting access to voters is patently tailored to that end.

CONCLUSION

The responsibility of a true amicus or "friend of the court" is to help the court reach an objective and pragmatic decision which is legally sustainable.

In this instance, the court's obligation is to balance the First Amendment rights of freedom of expression espoused by the press with the right to unimpaired access to the polling place for the purpose of casting a secret ballot guaranteed in articles and sections sprinkled throughout our Federal and State Constitutions.

Here, the "obligation of the press" to be the "eyes and ears of the public" cannot, in the name of freedom of the press or any other First Amendment right, assume any larger or greater right than that of the public for whom the press seeks to act and

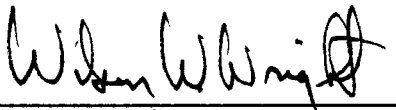
write. Unquestionably, the general public cannot interfere with the right of voters while exercising their constitutionally guaranteed right to a secret ballot. For this reason, the Legislature has seen fit to ban the public from the polling place. The press having no greater rights than the public may likewise be constitutionally barred from the polling place.

The Statute is narrowly drawn to further the Legislative interest in assuring both the fact and appearance of integrity in the election process. Regulations furthering this interest are a legitimate exercise of Legislative authority, and under Buckley and O'Brien, cannot be challenged on the basis that the motive of the Legislature in amending the statute was the suppression of First Amendment rights. If the Legislature determines that the preservation of the appearance of free, honest, and orderly elections requires that access to the immediate area surrounding the polls be limited to voters, certainly a law tailored to restrict access to that area can be sustained as serving a legitimate, constitutional purpose.

The real issue is the comparative right of the press versus the right of the elector to cast his ballot in a free, unemcumbered, and secret manner.

With all due respect to the press, with whom the Supervisors of Elections continue to work in their efforts to gather and disseminate the news, Amicus Curiae the urge that the press/elector conflict be resolved in favor of the right of an elector to cast a secret ballot without interference or impairment.

Respectfully submitted,



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