

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CHARLES W. BURSON, ATTORNEY GENERAL
AND REPORTER FOR TENNESSEE, Petitioner V.
MARY REBECCA FREEMAN ✓

CASE NO: 90-1056

PLACE: Washington, D.C.

DATE: October 8, 1991

PAGES: 1 - 35

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 CHARLES W. BURSON, ATTORNEY :

4 GENERAL AND REPORTER FOR :

5 TENNESSEE, :

6 , Petitioner :

7 v. : No. 90-1056

8 MARY REBECCA FREEMAN :

9 - - - - -X

10 Washington, D.C.
11 Tuesday, October 8, 1991

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:04 a.m.

15 APPEARANCES:

16 CHARLES W. BURSON, ESQ., Attorney General of Tennessee,
17 Nashville, Tennessee; on behalf of the Petitioner.

18 JOHN E. HERBISON, ESQ., Nashville, Tennessee; on behalf
19 of the Respondent.

1 CONTENTS

2	ORAL ARGUMENT OF	PAGE
3	CHARLES W. BURSON, ESQ.	3
4	On behalf of the Petitioner	
5	JOHN E. HERBISON, ESQ.	18
6	On behalf of the Respondent	
7	REBUTTAL ARGUMENT OF	
8	CHARLES W. BURSON, ESQ.	30
9	On behalf of the Petitioner	
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-1056, Charles W. Burson v. Mary Rebecca
5 Freeman.

6 General Burson, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF CHARLES W. BURSON

9 ON BEHALF OF THE PETITIONER

10 MR. BURSON: Mr. Chief Justice, and may it
11 please the Court:

12 This case presents facial challenge to a
13 Tennessee law which prohibits on election day campaigning
14 within 100 feet to the entrance of the polling place. To
15 put this distance into perspective, this courtroom is
16 almost 100 wide. Now, the Tennessee Supreme Court
17 suggested that 25 feet might meet constitutional muster.
18 As measured from where I stand, 25 feet goes to the second
19 row of the press section.

20 It's the State's position that the decision of
21 the Tennessee Supreme Court should be reversed and that
22 the purposes served by this statute are of the highest
23 import, and the limitation imposed on protected speech is
24 minimal. Each State should be permitted to fashion its
25 election zone boundary in a manner tailored to its

1 election-day conditions as long as that zone reasonably
2 serves the purposes which justify it.

3 Laws similar to Tennessee have been outstanding
4 over this country for the past century. They have
5 effectively served their purpose.

6 QUESTION: How many States have such laws? And
7 do most of them provide for a 100-foot limit or what?

8 MR. BURSON: 47 States have such laws. The
9 distances run from 25 feet to the maximum -- Hawaii has
10 1,000 feet. Most of them range between 50 feet and
11 200 feet. 100 feet is fairly typical. I think something
12 like 17 to 18 of the States have 100 feet.

13 QUESTION: General, when you say the States have
14 such laws, do you mean they have laws regulating conduct
15 not only in the polling place itself under the roof, but
16 laws regulating areas outside? Are there 47 that regulate
17 outside the polling place?

18 MR. BURSON: 47 regulate outside of the polling
19 place; 3 other States have laws that regulate, but only in
20 the polling place. That's only three States.

21 QUESTION: General Burson, what are the purposes
22 of those laws as you see them and in your State?

23 MR. BURSON: Well, political campaigns are
24 emotionally charged events. And I think we have to put it
25 in the proper context. They may be, for those campaigners

1 and candidates, the most emotionally charged events in our
2 national culture.

3 On election day, all of this emotion,
4 excitement, and tension is focused right on the polling
5 place. Campaign workers aren't always cool and reasoned
6 on election day. Polling places are in all kinds of
7 neighborhoods, the peaceful and the rough.

8 The entrances to polling places form a natural
9 bottleneck. Now, if you allow campaigning at those
10 bottlenecks, you're going to get crowds. Voters and
11 campaign workers alike are going to intermingle. The sale
12 pitches are going to go through the crowd and over the
13 crowd. They will not always be softly spoken. In many
14 situations they'll be shouting, jostling, and tempers may
15 flair. The effect of these conditions will be disorder,
16 disruptive noise, reaching the polling place, delays in
17 voting. These conditions elevate the chances for voter
18 intimidation.

19 QUESTION: Are there other State laws governing
20 interruption around the polls of voters -- voter
21 intimidation and that sort of thing?

22 MR. BURSON: Yes. Tennessee has both voter
23 intimidation laws and voter interference laws, and it's
24 our position that what the State has done and what the
25 States have done is through these zones is created at

1 prophylactic. Once there is intimidation, once there in
2 interference, the purposes of the State have been
3 defeated. They are basically after-the-fact type
4 remedies.

5 QUESTION: General Burson, don't some States
6 also have other prohibitions such as use of the media on
7 election day?

8 MR. BURSON: There have been --

9 QUESTION: By media I mean television, for
10 instance. Advertising on television.

11 MR. BURSON: I'm sorry, I didn't understand, Mr.
12 Justice Blackmun.

13 QUESTION: I'm under the impression -- as a
14 matter of fact, I know my home State has a statute
15 prohibiting political advertising on election day in
16 television. Does Tennessee have such a law?

17 MR. BURSON: They may so do -- no, our -- on
18 election day, there's plenty of advertising on TV on
19 Tennessee in the morning, particular.

20 QUESTION: I must confess that when I came, we
21 happened to live across the river in Virginia, that I was
22 almost offended by the presence of people handing out
23 literature within 25 feet of the polling place. One would
24 be put in the jug in Minnesota if he did that.

25 MR. BURSON: Well, let me make this. Except for

1 a limited situation, our -- the primary concern is not
2 just the annoyance, although we think at a certain point
3 that does become a constitutionally protectable interest
4 by the State. But what the States are concerned with is
5 this crowding. The increased opportunity for the
6 intimidation and for the interference. It creates a zone
7 which would -- which much reduces the risk to have to
8 apply, Justice O'Connor, those intimidation laws and the
9 interference laws.

10 Now aside from that, aside from criminal
11 intimidation and criminal interference, the crowd that
12 gathers itself around the entrance to the polling place
13 can be intimidating. Voting cuts across all character
14 types; all types of Americans go to vote. And what may
15 not be intimidating to a 30-year old lawyer going to the
16 polls may well intimidate an elderly citizen going or a
17 first-time voter. And rather than choose to run the
18 gauntlet, they may well just choose to turn around and go
19 home. And that defeats the purposes of maximizing voter
20 participation.

21 QUESTION: Now Tennessee's law does not prohibit
22 campaigning for a candidate in some other election and it
23 doesn't prohibit solicitation of commercial products and
24 that sort of thing. Is that right?

25 MR. BURSON: The latter part is right; the first

1 part is not right. Tennessee law prohibits the
2 distribution of campaign literature :-

3 QUESTION: Whether it's for that election or any
4 other?

5 MR. BURSON: Whether it's for that election or a
6 future election.

7 QUESTION: But commercial products and so forth,
8 there could be a Hari Krishna stand and so forth.

9 MR. BURSON: Well, there could be a Hari Krishna
10 stand or there could be a hot dog vendor or selling tuna
11 sandwiches.

12 QUESTION: So in that respect then, is the
13 statute content neutral?

14 MR. BURSON: We certainly would say that it is.
15 When you look at --

16 QUESTION: How do we judge content neutrality?
17 By looking at the purpose for which the statute is passed?

18 MR. BURSON: Well, I think you look to see
19 whether the regulation is only justified with reference to
20 the content of the speech. And in this case, there is no
21 sinister inference, sinister as to the First Amendment,
22 that offends the First Amendment as to why campaigning in
23 Tennessee is prohibited, but other types of activities
24 aren't.

25 The reason the other activities aren't

1 prohibited is they have just never been a problem in
2 Tennessee. They just weren't thought of when the
3 legislature did this. The legislature focused on election
4 reform. And when it thought of election reform, it
5 thought of the problems that are created.

6 QUESTION: Well, what about cases from this
7 Court, such as Kerry and Mosley, where the Court has said
8 that a State can't regulate some but not all potentially
9 disruptive expression?

10 MR. BURSON: I think what this Court, in looking
11 and Mosley and Kerry, what those -- where the legislature
12 specifically exempted a labor picketing, and what the
13 Court seemed to say was look, we can't see any difference
14 between labor picketing and other type of picketing.
15 They'll both have the same type of effect. So what the
16 Court, it seems to me concluded was, that the statute was
17 directed at a particular type of expression because of the
18 content of that expression, and that's labor picketing.

19 We just don't have this. I can't -- the failure
20 to include a hot dog vendor or a book salesman or a Hari
21 Krishna booth just has never been a problem in relation to
22 elections. There is -- excuse me.

23 QUESTION: Well, our cases have said, too,
24 haven't they, General, that the legislature can deal with
25 the evil where it finds it. It doesn't have to go all the

1 way if it doesn't find the evil going beyond a certain
2 point.

3 MR. BURSON: Absolutely. That's absolutely
4 correct. And if hot dog vendors become a problem and if
5 the Hari Krishna groups become a problem, then the
6 legislature could legislate to guard these same interests.
7 But that's exactly right.

8 QUESTION: If they became a problem and this
9 statute remained on the book, would there then be an
10 argument that the statute is no longer content neutral?

11 MR. BURSON: Well, certainly it would have been
12 content neutral as passed, and in terms of the motivation.
13 Now to preserve it, would that mean that it would become
14 unconstitutional at that point in time? I think at that
15 point in time it would begin to raise a question as to
16 whether this was intended actually to serve those
17 purposes. I think that's what the Court -- that's the
18 standard that the Court has to look at in making that
19 content-neutral determination.

20 Does the statute serve the purposes which it
21 says justified, or does the regulation serve those
22 purposes, and are those purposes related to the content of
23 the speech. And if you took your hypothetical far enough,
24 you might begin to raise the -- raise a question about
25 what the real purpose of the statute was. But that

1 doesn't exist here.

2 QUESTION: General Burson, the regulation here
3 would extend in some areas to public streets and public
4 sidewalks, if they were within the 100-foot limit. Is
5 that true?

6 MR. BURSON: Yes, there may be a portion of a
7 sidewalk that would be encompassed within the 100 feet.

8 QUESTION: And a street?

9 MR. BURSON: And some of them may even extend
10 into a street.

11 QUESTION: Does that affect the constitutional
12 analysis at all, do you think, where it's a traditional
13 public forum that's affected?

14 MR. BURSON: We don't think that it affects the
15 outcome. Depending upon how you interpret this election
16 zone as a public forum or not, even where it crosses a
17 traditional public fora, you might have -- if it's a
18 public fora, we would suggest the time, place, or manner
19 restriction. We would -- express that the Court basically
20 apply the balancing test that it applies when election
21 laws are contested.

22 And further, we think there's an argument,
23 Justice O'Connor, that even where on this 1 day both
24 private and public places are taken over by the
25 Government, taken control of and administered by the

1 Government for this one purpose, that an argument could be
2 fashioned and is very credible that even where it hits a
3 sidewalk, that that, in fact, is a nonpublic fora.

4 QUESTION: Suppose if the town can give a group
5 a parade permit that in effect preempts 10 blocks of a
6 city street that other people can't drive down in their
7 cars, they can't occupy the place. That part of the
8 street is reserved for a specific purpose. And you're
9 just suggesting, I suppose, that this part of the street
10 is -- within 100 feet are reserved for voting purposes.

11 MR. BURSON: Yes. I think that is one of the
12 things we are suggesting. Just if you have a street fair
13 where the area of both the sidewalks and the street are
14 roped off --

15 QUESTION: And I suppose if this statute is
16 immediately suspect because of lack of content neutrality,
17 I suppose that so would a statute which prevents
18 electioneering inside the voting booth itself.

19 MR. BURSON: And no other activities.

20 QUESTION: Or within 25 feet.

21 MR. BURSON: 25 feet, Your Honor, we would
22 suggest is purely a difference of degree, and not in kind.
23 And if 25 feet is okay, 100 feet is okay.

24 QUESTION: Does the statute permit 300 foot
25 limits in certain counties?

1 MR. BURSON: No, the statute has a provision in
2 it for 300-foot limit. That is not operative. Our office
3 issued an opinion basically based upon State
4 constitutional grounds that said the population
5 classifications as to that 300-foot limit were not
6 rational, and under specific provision of our State
7 constitution, it would not stand.

8 QUESTION: Does your statute permit official
9 poll watchers to -- within 100 feet?

10 MR. BURSON: The statute actually allows poll
11 watchers inside the polling place. It allows, I think,
12 one per candidate, and two per political party. But
13 that's very closely regulated in terms of --

14 QUESTION: Would your argument allow a State to
15 enact a statute designating certain traditional public
16 forums, portions of sidewalks or public parks and so on,
17 as sort of free zones solely for recreation or commerce so
18 long as they did not do so based on, at least on the
19 content of the speech that might otherwise take place
20 there?

21 MR. BURSON: Do you mean outside the context of
22 the election zone?

23 QUESTION: Yeah, how broad is your principle of
24 the State may sort of eliminate the traditional forum
25 character of public forums?

1 MR. BURSON: Well, I think there are laws that
2 do regulate your use. For instance, there's a law that
3 requires you to get a permit. You could take -- if you're
4 going to have 5,000 people at a public part or something,
5 you have to take out a permit that's regulated. And you
6 can then cut that area off for those exclusive purposes.

7 QUESTION: Well, how about my examples? Sort of
8 communication-free zones where people can go and not be
9 bothered in otherwise public forums? Is the State on your
10 theory free to do that?

11 MR. BURSON: I would say that our theory is that
12 what we are expressing is limited to these election zones.
13 You have to look at the very fundamental interests and
14 what the State's duty is that would justify such a zone.
15 And that's as far as we're going in this argument.

16 What -- it appears to us that the court, the
17 Tennessee Supreme Court, failed to address this issue in a
18 real-world context. It basically took the theoretical
19 proposition that because all subject matter was not
20 included, that that, per se, triggered content based.
21 We've discussed that before and we do not think that is a
22 proper approach. We think more inquiry needs to go beyond
23 that to determine whether or not the purposes are
24 justified without reference to the content of the speech.

25 But basically they failed to consider this in a

1 real-world context, and that's also revealed in its
2 failure to deal with the substantive constitutional legal
3 distinction. The concluding analysis of the Tennessee
4 court demonstrates this. The court suggested 25 feet
5 might meet constitutional muster. It must be assumed,
6 then that the court recognized the State's
7 constitutionally protectable interest outside the polling
8 place.

9 However, the alternative that the court
10 suggested, 25 feet instead of 100 feet, is one of degree.
11 Such a difference doesn't have a constitutional
12 significance. It's not a true alternative in kind.

13 If I might, the dissent in this case --

14 QUESTION: But if that argument is valid, I
15 suppose it would be okay to have 3,000-foot limit.

16 MR. BURSON: I think that question, Justice
17 Stevens, goes to the one that Justice Kennedy raised. The
18 State would have to be able to show that the statute is
19 fashioned to serve these legitimate purposes which justify
20 them. There is a point that you could get out which
21 brings into question the true purpose of the statute.

22 QUESTION: And the Tennessee Supreme Court said
23 100 feet is too much, but 25 feet isn't. Why is that any
24 more a matter of degree than your argument about 3,000
25 feet against 100?

1 MR. BURSON: Well, we would -- we would suggest
2 that it is. Just like in Buckley, the difference between
3 2,000 feet and 1,000 feet was a difference in degree, I
4 think the Court can observe for itself 25 feet to the end
5 of the press section, and almost 100 across this is -- the
6 same issues are implicated.

7 QUESTION: But one of the differences the court
8 pointed was that the evidence, as I remembered, really
9 related to what happened either in the polls or right
10 outside the door. And that if you go the full 100 feet,
11 you pick up the sidewalk and so forth in some areas.

12 MR. BURSON: Well, you know, this was basically
13 a facial challenge. The evidence, quite frankly, was very
14 skimpy. I could draw as many hypotheticals whether 25
15 feet went onto a sidewalk or went into the street.

16 Once you acknowledge -- it's our position, once
17 you acknowledge the interest outside the polling place,
18 then it's the legislature, and there should be a
19 presumption of constitutionality, who is in the best
20 position, through experience and the studies they're able
21 to do, to determine what that appropriate distance would
22 be.

23 QUESTION: Another thing I think they said you
24 didn't -- there no evidence of any studies here.

25 MR. BURSON: Well, there was an -- there was an

1 extensive -- there was an extensive law review commission,
2 although they were fairly conclusory in the results. We
3 would point to the Court's decision in Monroe, which
4 suggests, and we think it's perfectly fitting here, that
5 the State in these type of cases, shouldn't have to suffer
6 the harm before it addresses the problem and that the
7 State, to sustain these facial challenges, the State is
8 not required to put on the specific proof of the damage
9 and the confusion and the overcrowding.

10 QUESTION: Of course, I suppose the Tennessee
11 Supreme Court has more knowledge about local conditions
12 than we do.

13 MR. BURSON: Well, we would suggest that --

14 QUESTION: And I noticed also they relied in
15 part on the Tennessee constitution, didn't they?

16 MR. BURSON: No, sir. It was raised and then
17 never mentioned again. The constitutional provisions were
18 raised --

19 QUESTION: Well, they mentioned it in their
20 opinion.

21 MR. BURSON: Right in the beginning, but this
22 was solely decided upon the First and Fourteenth Amendment
23 and the way the Tennessee Supreme Court construed the
24 decisions of this Court.

25 QUESTION: That's correct.

1 QUESTION: General Burson, what is the situation
2 in Tennessee elections today? Is there a stay in effect
3 at all?

4 MR. BURSON: Well, I think that's very
5 interesting, Justice Blackmun. After this decision, there
6 was nothing to prohibit this. There was an election
7 coming up in November, and I think the decision came down
8 in October. They struck this statute down and there was
9 nothing to preclude this type of electioneering. The
10 State, we went in and asked for a stay. The argument was
11 raised that well, there are these criminal statutes in
12 effect that will take care of this problem, and the
13 supreme court stayed its decision. So as of today the law
14 is -- they determine unconstitutional, is still
15 outstanding in Tennessee.

16 I'd like to reserve the remainder of my time for
17 rebuttal.

18 QUESTION: Very well, General Burson.

19 Mr. Herbison, we'll hear now from you.

20 ORAL ARGUMENT OF JOHN E. HERBISON

21 ON BEHALF OF RESPONDENT

22 MR. HERBISON: Mr. Chief Justice, and may it
23 please the Court:

24 In order to understand why the opinion of the
25 Supreme Court of Tennessee is correct, both in its result

1 and in its reasoning, it is necessary to examine exactly
2 how this statute, which is a criminal statute, affects
3 free speech at polling places.

4 The statute operates basically in three
5 different geographical locations. The statute prohibits
6 the solicitation of votes, display, or distribution of
7 campaign literature or materials inside the polling place
8 itself. That is not the subject of the plaintiff's
9 challenge to this statute. The plaintiff has never
10 averred any intention to solicit votes inside the polling
11 place and they --

12 QUESTION: Well, Mr. Herbison, would you think
13 the same standard and test should be applied to
14 regulations inside the polling place as outside?

15 MR. HERBISON: Justice O'Connor, inside the
16 polling place, the State's interest is monumentally
17 greater than outside. Inside the polling place, the
18 election is actually being conducted. There is a much
19 greater risk inside the polling place of interference with
20 the election officials' duties or with interference with
21 the actual conduct of the election.

22 QUESTION: So you think there's just a more
23 compelling State interest inside. Is that it?

24 MR. HERBISON: That is correct, as the Supreme
25 Court of Tennessee found.

1 QUESTION: Otherwise the test applied would be
2 the same. It's just the value or weight you place on the
3 State's interest in your analysis?

4 MR. HERBISON: It is the same test. And we
5 submit that the court below reached the correct conclusion
6 that the State's interest is greater inside -- inside the
7 building.

8 QUESTION: Do you defend the court's decision
9 that the regulation can extend to 25 feet but not 100?

10 MR. HERBISON: Well, clearly a 25-foot boundary
11 would be more nearly constitutional than the 100- or
12 300-foot boundary currently enforced. I beg your pardon?

13 QUESTION: 75 feet more -- closer.

14 QUESTION: So what's your answer?

15 MR. HERBISON: However, we do not --

16 QUESTION: Do you defend the holding of the
17 court or not?

18 MR. HERBISON: We do not. If it were a
19 regulation that, as this one does, singled out core
20 political speech within that 25-foot radius, we submit
21 that that hypothetical statute would suffer from the same
22 defect as the current 100-foot or 300-foot boundary.

23 Outside the polling place, a radius of 100 feet
24 in most of the State, of 300 feet in some counties -- and
25 that 300-foot boundary has not been addressed by any

1 court, even though the Attorney General has given an
2 opinion that that violates the State constitution. It is
3 still in force and has not been addressed by any court,
4 the distinction between 300 feet and 100 feet. In light
5 of the disposition that the Tennessee Supreme Court made
6 in this case, it was not necessary for them to reach that,
7 even though it was raised in the pleadings.

8 Within that prohibit -- within that radius, the
9 solicitation of votes, display or distribution of campaign
10 materials or literature is outlawed. In cases where the
11 grounds of the polling place extend beyond the 100-foot or
12 300-foot buffer zone, on the areas outside the buffer zone
13 and still on the grounds of the polling place, it would
14 appear that purely verbal solicitation is permitted, but
15 the display of material is still prohibited on the grounds
16 of polling places.

17 The kinds of things forbidden by this statute
18 extend to a campaign worker carrying a political sign. A
19 voter wearing a tee-shirt with the name of his preferred
20 candidate going into the polling place would risk criminal
21 prosecution. A broad range of pure political speech is
22 prohibited by this statute, and the statute reaches only
23 pure political speech, which this Court has repeatedly
24 recognized is deserving of the greatest level of First
25 Amendment protection.

1 QUESTION: Suppose two friends go to the polls
2 together and they're supporting different candidates, and
3 as they get within the 100-foot area, they're supposed to
4 quit trying to confer to each other.

5 MR. HERBISON: That would be correct, at least
6 to the extent of any kind of solicitation of one of the
7 other to vote his way. That would be prohibited.

8 QUESTION: Would the statute prohibit a person
9 from driving down a public street that was within the
10 100-foot limit with a bumper sticker on the car that was
11 in support of a candidate?

12 MR. HERBISON: This statute would prohibit that.
13 That would clearly be the display of campaign material.

14 QUESTION: Well, that may be. The statute
15 wouldn't necessarily be void on its face just because of
16 that.

17 MR. HERBISON: Not necessarily just because of
18 that. However, singling out pure political speech and
19 leaving other messages unaffected presents clear First
20 Amendment problems.

21 QUESTION: Mr. Herbison, you say it creates a
22 First Amendment problem because you're relying on
23 something called the traditional public forum doctrine.
24 Don't you take the traditional public forum with the
25 limitations that tradition imposes upon traditional public

1 forums?

2 MR. HERBISON: Justice Scalia, in this case we
3 have a public forum property dedicated -- have properties
4 dedicated to expressive activity by governmental fiat,
5 that is, voting.

6 QUESTION: But that's my point. Has it been
7 dedicated under the traditional public forum doctrine? As
8 General Burson pointed out, there are a lot of these
9 statutes now, but not only are not -- are they around
10 now -- the earliest one I find goes back to 1875. And
11 between 1889 and 1905, there are at least 22 States that
12 had statutes like this, and another 6 that had statutes
13 completely barring people within 100 feet. So don't you
14 take the traditional public forum doctrine the way you
15 find it? And it seems to me that this has been done a
16 long time.

17 MR. HERBISON: Well, Your Honor, this is, we
18 submit, is a case of the public forum by Government fiat.
19 This Court recognized, *United States v. Classic*, that
20 voting is expressive activity. It is the expression by
21 electors of their choice of candidates.

22 QUESTION: Well, maybe you want to give the
23 doctrine a new name then? We should not call it the
24 traditional public forum doctrine since we are not at all
25 adverting to what tradition said about it. I mean, what

1 I'm saying is this has been going on for at least a
2 century, indeed for probably half a century longer than
3 there was even such a thing as the traditional public
4 forum doctrine. We either have to rename the doctrine or
5 come out against you in this case, I think.

6 MR. HERBISON: Well, whatever label this Court
7 chooses to affix is --

8 QUESTION: A nontraditional public forum
9 doctrine.

10 MR. HERBISON: Of course, there is an element of
11 the public forum doctrine that addresses properties which
12 are public forum by governmental edict, which is, we
13 submit, what we have here.

14 Voting is expressive activity. Discussion of
15 candidates and qualification of candidates is an integral
16 part of the electoral process. This Court recognized such
17 cases as Mills v. Alabama --

18 QUESTION: Mr. Herbison, to follow up on Justice
19 Scalia's inquiry, you say this is -- this area is
20 dedicated to expressive activity, i.e., voting. But it's
21 dedicated with the proviso that you can't electioneer
22 within 25 -- or within 100 feet. I mean, you have to take
23 the proviso as well as the dedication, don't you?

24 MR. HERBISON: Well, we submit the legislature
25 is not empowered to impose that kind of restriction

1 singling out a particular type of speech. It's clear that
2 the legislature cannot prohibit discussion of candidates
3 on election day, as was the case in Mills v. Alabama.
4 There was dictum in that case suggesting that conduct at
5 polling places can be regulated. But that case stands for
6 the proposition that speech, especially pure political
7 speech, is entitled to greater protection than
8 communicative conduct.

9 This is a case where we have pure speech
10 restricted and not even all political speech is prohibited
11 within this buffer zone, contrary to General Burson's
12 assertion. The State's witness clearly testified that
13 political solicitations on behalf of candidates who are
14 not on that day's ballot are permitted within the 100-foot
15 boundary -- pages 40 -- excuse me, pages 43 and 44 of the
16 joint appendix, before this Court is the first time that
17 the Attorney General has tried to put any distance between
18 the State's position and the State's witness' position.

19 To illustrate the operation of the statute,
20 Tennessee holds presidential preference primaries in
21 March, and in August, holds another primary election for
22 various other offices -- United States Senator, Governor,
23 United States House of Representatives, and some others.
24 According to the testimony of the State's witness, Ms.
25 Freeman could lawfully stand 10 feet away from the door of

1 a polling place in August of 1992, advocate the reelection
2 or defeat of President Bush, who is not on that day's
3 ballot but who would be on the November ballot 3 months
4 later. However, if her message were reelect Congressman
5 Clement, then she would risk going to jail.

6 The focus of the statute, the narrow focus on a
7 particular political candidate strongly suggests that the
8 legislative intention was to suppress speech related to
9 particular speech when interest in that particular
10 interest was at its peak. The statute also restricts, not
11 only restricts the right of political campaign workers to
12 speak, it restricts the right of voters to receive
13 information. This Court has recognized that First
14 Amendment protects the right to receive information as
15 well as the right to disseminate it.

16 The Supreme Court of Tennessee correctly applied
17 the strict scrutiny test, correctly found that this is
18 clearly a content-based statute because it reaches only
19 one category of speech. The Attorney General takes the
20 position that this is merely a time, place, and manner
21 regulation.

22 QUESTION: Mr. Herbison, suppose you have a
23 municipally owned subway or trolley car line which carries
24 advertising, but decides not to carry political
25 advertising, just because it upsets people. They're

1 hassled enough on the way home from work, and they don't
2 have to look at partisan political posters, so they just
3 ban political advertising to this captive audience,
4 because the people have to ride the subway or the trolley
5 home. Is that constitutional?

6 MR. HERBISON: Well, certainly the Lehman
7 decision suggests that it is.

8 QUESTION: Suggests that it is because it's sort
9 of a captive audience, right? And isn't it sort of a
10 captive audience, when the only way you can get to the
11 polling place is to run the gauntlet of electioneering?
12 But I don't want to listen to electioneering. I mean,
13 suppose I'm a citizen saying, you know, I've read the
14 papers, I've made up my mind. I don't want to be hassled
15 by these people.

16 Now you're free to hassle me, but I'm free not
17 to be hassled in a coerced situation. Isn't that a
18 reasonable basis for these statutes?

19 MR. HERBISON: Well, this Court has recognized
20 that the reaction of a listener to speech projected his
21 way is not a valid basis for limiting First Amendment
22 rights. Cases decided more recently than Lehman --

23 QUESTION: With listeners in a captive
24 situation?

25 MR. HERBISON: Well, a listener is to some

1 extent in a captive situation here, but not to the same
2 extent as in Lehman.

3 QUESTION: Only if he wants to vote.

4 MR. HERBISON: This is the kind of situation
5 that presupposes a speaker and a willing listener if --
6 well, the purpose of the speaker being here is to persuade
7 the voter to cast his vote in a particular manner. Where
8 the voter clearly does not want to be bothered, the
9 campaign worker will surely give that voter a wide berth,
10 let him proceed on to the polling place.

11 However, in the case of a willing listener, who
12 is willing to stand aside, out of the flow of traffic, and
13 listen to the campaign worker's pitch, that's not a
14 captive audience situation. Human nature is going to be
15 basically regulated --

16 QUESTION: These workers are not allowed to say
17 there, just repeating, you know, vote for so and so, he's
18 a fine man. He believe in family -- he's just shouting
19 that at the top of his lungs. Could a worker do that
20 under your theory. He could do that, couldn't he?

21 MR. HERBISON: He could do that so long as --

22 QUESTION: So you say I have to plug my ears
23 just as the person coming home from work in the subway
24 will just have to cover his eyes. Just don't look at the
25 political poster if you don't want to look at it.

1 But I suggest that we haven't held that with
2 respect to political posters in the subway, so why should
3 we do it, why should we hold that with respect to
4 political chance at the polling booth?

5 MR. HERBISON: In the case of the subway or
6 public transit, the government is operating in essentially
7 a proprietary capacity. In the case of a polling place,
8 the government, or at least the State government makes
9 only limited temporary use of the facilities. This is not
10 a case like a subway car or like the post office where the
11 government is operating in a proprietary capacity.

12 The Attorney General contends that this is
13 merely a time, manner, and place regulation. We submit
14 that that is incorrect. But even if that contingent were
15 correct, even if the statute were content neutral, this
16 statute prohibits a broad range of speech, far more than
17 is necessary to achieve the asserted justifications for
18 the statute. Even under the time, place, and manner test,
19 this statute is not narrowly tailored to achieve the
20 asserted ends.

21 The Government's only justification asserted
22 before the trial court was the prospect of interference
23 with the voting process, overcrowding of the polling room
24 itself. And there is really no proof, as the State court
25 noted, to suggest that activity outside the polling place

1 is going to have an adverse effect on the conduct of the
2 election inside. Therefore, no matter what the standard
3 of review is, the strict scrutiny that the State court
4 applied, or the time, place, and manner regulation that
5 the Attorney General contends for, this statute fails
6 either test.

7 We submit that the Supreme Court of Tennessee
8 reached the correct result and applied the correct
9 reasoning.

10 If the Court has no further question, that
11 concludes my remarks.

12 QUESTION: Thank you, Mr. Herbison.

13 General Burson, do you have rebuttal?

14 REBUTTAL ARGUMENT OF BURSON
15 ON BEHALF OF THE PETITIONER

16 MR. BURSON: Very brief, I hope, Your Honor.
17 The question was raised about the State's position
18 regarding someone advocating the election of someone that
19 was not on the ballot. And I think Justice O'Connor
20 started with that question. On page 11 of respondent's
21 brief, they set the predicate for that up. They say the
22 State's witness testified that a person is permitted to
23 distribute handbills within the 100-foot boundary on
24 behalf of a political figure who is not standing for
25 election on that day's ballot.

1 However, the record on page 43 of the appendix,
2 the testimony was: Question: Okay, if a person were
3 distributing handbills on behalf of a political figure who
4 was not standing for election on that day, could that
5 person do that inside the 100-foot boundary. The
6 unequivocal answer was no, they could not.

7 So we would say the predicate for that position
8 is not there. There was a further discussion, could
9 someone on the ballot just generally hand out literature
10 that said they had a good record. There was a suggestion,
11 well, if they were on the ballot they couldn't. If they
12 weren't on the ballot, they could.

13 But it is clear -- a reading of the statute --
14 it doesn't distinguish between whether it's on the ballot
15 or not on the ballot if it's campaign activity. The
16 Tennessee Supreme Court has clearly defined campaign
17 activity as that which is outcome determinative advocacy.
18 It's the position, and clearly the position, of the State
19 that such conduct would be prohibited.

20 One other point. It's not just what goes on
21 outside of the polling place, but also if you've got a
22 crowd, and you've got the noise, and you've got the
23 campaign happen -- taking place either right outside of
24 the polling place, which is what respondents advocate, or
25 even within 25 feet, we would suggest that noise is going

1 to reach inside the polling place. And that noise, in and
2 of itself, is going to distract polling officials.

3 QUESTION: Let me just, on -- your correction on
4 page 43, just as a point of information. There was also a
5 question about distributing handbills that say abortion is
6 murder, would that be permissible or not permissible?

7 MR. BURSON: I think we would have to apply the
8 standard is outcome determinative advocacy. Obviously if
9 there were an abortion question on the ballot --

10 QUESTION: No, the assumption was there was no
11 abortion question on the ballot, but presumably some
12 candidates might have views one way or the other on
13 abortion.

14 MR. BURSON: Just a -- it's kind of, I guess,
15 like the Hari Krishna -- if somebody is just saying we're
16 for or against --

17 QUESTION: This not really -- this is not a very
18 improbable example, I don't think.

19 MR. BURSON: We're for or against -- no, but it
20 really -- it just --

21 QUESTION: Let's say they had something, reduce
22 the deficit, or I'm against high taxes, no more taxes.

23 MR. BURSON: I think that just a general
24 statement that was not directed at an outcome either for
25 this or another election would be permitted.

1 QUESTION: You don't think that would be as
2 likely to provoke fistcuffs as the --

3 MR. BURSON: Well, you know, it might if it were
4 happening, and if that became the case, the State is
5 empowered to restrict that.

6 QUESTION: Yeah, but this statute wouldn't
7 restrict it.

8 MR. BURSON: This statute, if it's not outcome
9 determinative advocacy, this statute would not prohibit
10 it.

11 QUESTION: And what about tee-shirts and
12 campaign buttons?

13 MR. BURSON: Tee-shirts and campaign buttons are
14 restricted under this statute.

15 QUESTION: So a voter cannot wear a little
16 campaign button going into --

17 MR. BURSON: A voter is asked to take the
18 campaign button off as they go in. It's our position --
19 look, buttons and tee-shirts and hats and signs are all
20 part of campaigning activity. They all implicate and
21 invite the same problems. When you start --

22 QUESTION: And a bumper sticker on a car driving
23 by on the street that happens to fall within the 100-foot
24 limit?

25 MR. BURSON: Yeah. That is a hypothetical --

1 QUESTION: Covered by the statute.

2 MR. BURSON: We would suggest that if someone
3 were to get arrested for that, you'd have to look at it on
4 an as-applied basis. We don't think it implicates this
5 statute.

6 QUESTION: There's no exception in the statute
7 to take it out of it.

8 MR. BURSON: No. There's not an exception to
9 the statute.

10 QUESTION: Or the car that parks in the parking
11 lot within the 100-foot limit and has bumper stickers on
12 it for candidates.

13 MR. BURSON: That is not an exception in the
14 statute.

15 QUESTION: Of course -- perhaps with good
16 reason. I mean, some people -- you know, maybe in
17 Chicago, at least, somebody might intentionally drive down
18 the street with a bumper sticker on, or intentionally park
19 his car within 100 feet of the polling place. That might
20 happen, mightn't it?

21 MR. BURSON: Exactly. And what you're looking
22 at is, is it campaign activity. Are they doing this to
23 advocate the candidacy within that zone. That's exactly
24 what we're looking at. Certainly, there may well be a due
25 process problem in an as-applied situation or some other

1 place as applied, but it doesn't implicate this statute
2 facially.

3 If there are no further questions, thank you
4 very much.

5 CHIEF JUSTICE REHNQUIST: Thank you, General
6 Burson.

7 The case is submitted.

8 (Whereupon, at 11:49 a.m., the case in the
9 above-entitled matter was submitted.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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:

#90-1056 - CHARLES W. BURSON, ATTORNEY GENERAL AND REPORTER

FOR TENNESSEE, Petitioner V. MARY REBECCA FREEMAN

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

BY Michael Sander

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

91 OCT 16 P4:47