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County Clerk/Registrar of Voters (CC/ROV) Memorandum #08285

TO: All County Clerks/Registrars of Voters

FROM: *Cathy Mitchell*
Cathy Mitchell
Chief, Elections Division

RE: November General: Electioneering

The topic of what constitutes "electioneering" at the polls on Election Day – and more specifically, whether a voter who wears a campaign shirt, hat, button, or similar item into a polling place is indeed "electioneering" – has come up recently. While the term "electioneering" is not defined in the Elections Code, the Secretary of State's office has consistently taken the position that voters who bring information into a polling place that advocates for or against any candidate or measure on the ballot are indeed engaged in "electioneering."

Elections Code section 18370 states:

No person, on Election Day, or at any time that a voter may be casting a ballot, shall, within 100 feet of a polling place or an elections official's office:

- (a) Circulate an initiative, referendum, recall, or nomination petition or any other petition.
- (b) Solicit a vote or speak to a voter on the subject of marking his or her ballot.
- (c) Place a sign relating to voters' qualifications or speak to a voter on the subject of his or her qualifications except as provided in Section 14240.
- (d) Do any electioneering.

As used in this section, "100 feet of a polling place or an elections official's office" means a distance 100 feet from the room or rooms in which voters are signing the roster and casting ballots. Any person who violates any of the provisions of this section is guilty of a misdemeanor.

Elections Code section 18541 states:

- (a) No person shall, with the intent of dissuading another person from voting, within 100 feet of a polling place, do any of the following:
 - (1) Solicit a vote or speak to a voter on the subject of marking his or her ballot.
 - (2) Place a sign relating to voters' qualifications or speak to a voter on the subject

of his or her qualifications except as provided in Section 14240.

(3) Photograph, videotape, or otherwise record a voter entering or exiting a polling place.

(b) Any violation of this section is punishable by imprisonment in a county jail for not more than 12 months, or in the state prison. Any person who conspires to violate this section is guilty of a felony.

(c) For purposes of this section, 100 feet means a distance of 100 feet from the room or rooms in which voters are signing the roster and casting ballots.

The Secretary of State's Poll Worker Training Guidelines of 2006, located at http://www.sos.ca.gov/elections/poll_worker_training_guidelines_final_draft1.pdf, contains the following for county elections officials on page 22:

Poll workers must learn exactly what constitutes electioneering. They need to understand how to calculate 100 feet from a polling place, what activities are prohibited within that perimeter, and how to address the situation if they either observe or receive a report that electioneering is occurring in or near their polling place. Poll workers also need to be aware what types of materials are not allowed in the polling place, and how to remedy the situation if there is the potential for passive electioneering (e.g., a voter enters a polling place wearing a t-shirt or conspicuous button promoting a candidate or ballot measure).

Instruction must also be provided on the difference between electioneering and exit polling (which is allowed beyond 25 feet of the polls) and how to handle public opinion pollsters or news media who violate these restrictions.

The California Secretary of State's office has made a Voter Fraud Protection Handbook available on its website at <http://www.sos.ca.gov/elections/vfph-2008.pdf> for several years. Written in a "question-and-answer" format, the handbook contains the following recommendations to voters and others interested in the electoral process:

When I went into my polling booth, I noticed a little pencil with a candidate's name on it urging voters to be sure and mark the box for him. Can they do that? No, it is illegal to have items with a candidate's name on them in the polling place. This constitutes electioneering and any electioneering must be conducted a minimum of 100 feet from the place where people are voting. Sometimes, a voter inadvertently leaves such materials in the voting booth. (EC §18370)

A lady working at my polling place last Election Day was wearing a T-shirt that said "Down with Liberals" on it. Can she wear that? Because such a t-shirt doesn't actually advocate voting for or against a particular candidate or measure, it's not considered electioneering. If the shirt had a statement for or against something or someone on the ballot, it would not be allowed within 100 feet of the polls. If the elections official is aware of the situation, he or she will likely request that the woman cover it up or change into something that does not cause the slightest appearance of partisanship. (EC §18370, 18541, 18546)

For several election cycles, the California Secretary of State's office has sent employees to observe the Election Day practices in selected counties. All of the observers are provided with an Election Observer Training Manual that contains the following:

Clearly the Legislature has decided that voters should not be distracted or unduly influenced at the time they are casting ballots. Keep your eye out for any of this type of activity that may occur within 100 feet of the polls. In recent years, instances of electioneering have occurred when voters attempt to wear campaign buttons or t-shirts with slogans supporting (or opposing) candidates or ballot measures into the polling place. They may not even be consciously aware that they are "electioneering" when they do so. Poll workers should politely ask these persons to remove the illegal slogans (in cases of t-shirts, if such a place is available, they may go into a restroom or other private location and turn the garment inside out, if a sweater or other cover is not available). Generic slogans are usually acceptable – such as "voters for equal opportunities" or similar types of messages. But any message that can be reasonably connected to a candidate or measure that is on the ballot cannot be allowed within 100 feet of the polls.

This issue came before the Mendocino County Superior Court in 1998 in the case of *SPEAK UP!, et al. v. Marsha A. Young*. The plaintiff sought a preliminary injunction after Registrar of Voters Young deemed their attempt to wear buttons advocating for a particular candidate in the polling places constituted "electioneering" and was precluded by Elections Code section 18370. While this case does not serve as a binding precedent in the remaining 57 counties, the court did a good job of framing the issues involved. The court denied the plaintiff's request for a preliminary injunction, writing in part:

"This 'thoughtful/quiet zone' where no further political bombardment can occur actually protects and safeguards even petitioners' own political free speech. Exercising one's right to vote to elect one's leaders and enact laws is the ultimate unrestricted political free speech. The temporary (five to ten minute) covering or removal of political buttons in the limited polling areas while voting is a very slight inconvenience necessary to safeguard a free and untainted electoral process. This protected right and process underlies and is interwoven with all other rights.

"While a political button without fighting words on its face may seem harmless or inconsequential to a strong or opinionated person, not every voter is difficult to influence and intimidate – even to leave a polling place without voting. Even the simplest button is a political statement which invites a response. Given the strong feelings surrounding most political votes, the response is not always peaceful. Without this 100 foot protective zone, it is a very short slide to walking, flashing, electronic sandwich boards and a return to 'political gang colors' and intimidation which hinder free elections.

“The polling booth areas are also not traditional ‘public forums’ . . . Polling areas are immemorially held in trust for the quiet, undisturbed and free exercise of the public’s right to privately vote their political consciences.”

The judge in that case based his ruling in part on the U.S. Supreme Court’s 1992 decision in *Burson v. Freeman*, which dealt with the larger question of whether a Tennessee law banning the display and distribution of campaign materials within 100 feet of a polling place was constitutional. The Court ruled that the Tennessee statute was indeed constitutional, concluding in part:

“In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States’ compelling interests in preventing voter intimidation and election fraud.

“Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.”

If you have any questions or would like to discuss this further, please don’t hesitate to call me at (916) 657-2166.