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December 28, 2006

The Honorable Stuart Rabner
Attorney General of New Jersey
Hughes Justice Complex
P.O. Box 080
25 West Market Street
Trenton, New Jersey 08625

**Re: Request for comment on electioneering, exit polling, entry polling
and the distribution of pamphlets**

Dear Attorney General Rabner:

Thank you for your October 24 request for comments regarding “exit polling, entry polling, and the distribution of pamphlets within 100 feet of the entrance of a polling place” on election day. For the reasons that follow, and in light of the current state and federal law on the subjects of electioneering, the presence of persons in and near the polling place, and voter intimidation, we recommend that you issue a directive providing that exit polling and election-protection activities are permissible outside of polling places, and within 100 feet from the entrance to the “polling place or room,” defined hereinafter as the actual room or location within the building where voting occurs, and provided that the poll entrance is not obstructed.

Let me briefly summarize the relevant state statutes:

N.J.S.A. 19:34-15 provides that “[i]f a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question within the polling place or room or within a distance of one hundred feet of the outside entrance to such polling place or room, he shall be guilty of a disorderly persons offense.” While the statute does not define “polling place,” it appears, from N.J.S.A. 19:8-1, that “polling place”

means the actual room or locus where the tables and voting machines are located within a building, but not the building itself. *See id.* (“polling place or room shall be within a building wherein a district board is directed as hereinafter provided to meet for the purpose of . . . conducting elections”).

N.J.S.A. 19:34-6(a) provides that “If a person shall on election day . . . obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter in or near the polling place, or, with the purpose to obstruct or interfere with any voter or to unduly delay other voters from voting . . . or do any electioneering within any polling place or within one hundred feet thereof, he shall be guilty of a crime of the third degree.”¹ To “loiter” is “to remain in an area for no obvious reason.” *See* <http://www.m-w.com/dictionary/loitering> (last visited November 16, 2006).

N.J.S.A. 19:34-7 makes it a fourth-degree offense for “any person within the polling place or within a hundred feet thereof [to] loiter, electioneer, or solicit any voter.” No specific intent is provided for in this statute. “Soliciting” is undefined by the statute, however, its usage in N.J.S.A. 19:34-15, limited to prohibiting the “solicit[ing]” of support for candidates or questions, does not suggest a broad definition. Moreover, in other election and penal statutes, its usage manifestly suggests that it cannot be read to mean *any* request or plea, but rather one in which a commercial or monetary exchange is proposed, a threat of violence is made, or some other independently illegal conduct is proposed. *Cf.* N.J.S.A. 2C:12-1.2(a) (“solicitation” to commit criminal endangerment); N.J.S.A. 2C:20-4 (deceptive “solicit[ation]” for charity); N.J.S.A. 2C:20-17(a), 2C:24-9(a), and 2C:35-6 (“solicit[ing]” juvenile to commit car theft, drug distribution or other crime); N.J.S.A. 2C:27-2 and -10 (“solicit[ing]” benefit as an element of bribery of public employee); N.J.S.A. 2C:28-5(c) (“solicit[ing]” a benefit to engage in witness tampering); N.J.S.A. 2C:33-28(a) and (d) (“solicit[ing]” gang membership); N.J.S.A. 2C:34-1(a)(4)(d) (“soliciting” prostitution); N.J.S.A. 2C:37-2(a)(2) (“solicitation” of gambling); N.J.S.A. 2C:38-5(b) (“solicit[ing]” funds for terrorism); N.J.S.A. 19:34-20 (“solicit[ing]” a false voter registration); N.J.S.A. 19:34-32 and 19:44A-20 (“solicit[ing]” and “solicitation” of unlawful campaign contributions).

We also note that pursuant to N.J.S.A. 19:15-8(a), which regulates the interior of the polling place, “[n]o person shall be allowed or permitted to be present in the polling place or polling room during the progress of the election except” elections officials, candidates, voters, challengers, and “such officers as may be duly detailed to be present, pursuant to this title, for preserving the peace or enforcing the provisions hereof.”

¹ N.J.S.A. 19:34-15, -6(a), and -7 make similar electioneering-type conduct a disorderly persons, or a third-degree, or fourth-degree offense.

Moreover, the owners or administrators of private or public buildings where polling places are situated have the right, under generally-applicable trespass laws, to exclude persons (other than voters, challengers, and election workers), from the premises. *See generally* N.J.S.A. 2C:18-3(a) (punishing trespasses into buildings, including schools, by persons “not privileged or licensed” to be present there); N.J.S.A. 2C:18-3(b) (punishing trespasses into places posted against trespassing).

Finally, N.J.S.A. 19:34-1.1 criminalizes conduct that “intimidates, threatens or coerces, or attempts to intimidate, threaten or coerce, any person for registering to vote, voting or attempting to register to vote or vote, urging or aiding any person to register to vote, to vote or to attempt to register or vote.” Likewise, N.J.S.A. 19:34-11 makes it a crime to “interfere[] with . . . the voters lawfully exercising their rights of voting at the election.” Voter threats or coercion are also crimes under Federal law, with 42 U.S.C. § 1973i(b) providing that “[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote.”

Based on the foregoing statutes, we believe that the following points are established:

First, threats, intimidation, or coercion of voters are amply dealt with under federal and state law, and are illegal wherever committed. Under these laws, the conduct of persons pretending to serve an election-protection function, but in reality engaged in the foregoing types of forbidden activity, is readily punishable.

Second, under the most geographically expansive of the anti-electioneering statutes, N.J.S.A. 19:34-15, no person may “offer any suggestion or solicit any support for any candidate, party or public question” either in the polling place or within 100 feet of the outside entrance to the polling place. The statutory phrase “*outside* entrance to such polling place or room” (*id.*, emphasis added) suggests that the electioneering-free zone extends 100 feet in all directions from the entrance from the outdoors into the building that houses the polling place or room.

Third, N.J.S.A. 19:34-6(a) proscribes “obstruct[ing]” the “entrance” to a polling place and loitering “in or near” the polling place. It also proscribes any electioneering within any polling place or within one hundred feet thereof, when done with the specific intent “to obstruct or interfere with any voter or to unduly delay other voters from voting.”² In a similar vein, N.J.S.A. 19:34-7 bars, within the same geographical area, the “solicit[ing]” of “any voter.”

² With regard to this last provision, we note that the reference is to 100 feet from the “polling place” and not 100 feet from the “outside entrance to” the polling place (as provided in N.J.S.A. 19:34-15), making this statute slightly less expansive geographically.

Fourth, no person except those defined under N.J.S.A. 19:15-8 may be present inside the “polling place or polling room” during the election.

We now consider how those statutes apply to exit polling, entry polling, the distribution of pamphlets, and election-protection activity, and how the Constitutions of New Jersey and the United States may affect the application of these statutes. In order to do so, however, we first consider the precise meanings of the terms “electioneering,” “exit polling,” “entry polling,” “the distribution of pamphlets” and “election protection activity.”

We note that the statutes do not define “electioneering”; however, the dictionary definition of the term is “to take an active part in an election; specifically: to work for the election of a candidate or party.” See <http://www.m-w.com/dictionary/electioneering> (last visited November 16, 2006). This definition is remarkably similar to the conduct mentioned in N.J.S.A. 19:34-15, *viz.*, to “distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question.” Given the dictionary definition of “electioneering” and the provisions of N.J.S.A. 19:34-15, we regard “electioneering” as synonymous with “distribut[ing] or display[ing] any circular or printed matter” supporting a candidate, party or public question or “offer[ing] any suggestion or solicit[ing] any support for any candidate, party or public question.” We also believe that the electioneering bar under N.J.S.A. 19:34-6 and -7 should be read to forbid the distribution of materials in *opposition* to a candidate, party, or public question, or offering or soliciting *opposition* to a candidate, party, or public question. By the terms of this definition, “electioneering” excludes nonpartisan election-protection or voter education efforts, whether verbal or written, because, although such activity may include “distribut[ing] or display[ing] any circular or printed matter,” such activity is not “for [or against] any candidate, party or public question,” therefore taking it outside the ambit of N.J.S.A. 19:34-6, -7 and -15.

We consider “exit polling” to mean a non-coercive question to a voter as to how he or she voted, generally but not exclusively conducted by media organizations or their designees, and the voter’s responses to such requests, which may be accompanied by the distribution of printed materials.³

³ See also http://www.pollster.com/exit_polls/exit_polls_what_you_should_kno_1.php (last visited November 15, 2006):

The exit pollster begins by drawing a random sample of precincts within a state, selected so that the odds of any precinct being selected are proportionate to the number that typically vote in that precinct. The National Election Pool (NEP) consortium, which is conducting the exit polling for the six major networks, will send exit pollsters to more than 1,000 precincts across the country today.

One interviewer will typically report to each sampled precinct. Each interviewer will stand outside and attempt to randomly select roughly 100 voters during the day as they exit from voting. The interviewer will accomplish this task by counting voters as they leave the polling place and selecting every voter at a specific interval (every 3rd or 5th voter, for example). The interval is chosen so that approximately 100 interviews will be spread evenly over the course of the day. As

We are unfamiliar with the term “entry polling,” although it could appear to refer to inquiring as to how a voter intended to vote before entering the polling place. Obviously, its precise meaning would affect our views about this conduct. The fact that approaching a voter before the vote was cast could raise the potential of indirect electioneering would factor into those views, but we are reluctant to offer an opinion before we are more informed.

We understand the term “distribution of pamphlets” to mean distribution of printed materials of whatever character, whether in the nature of nonpartisan voter education, election-protection information, or advocacy for a candidate, party or issue. However, since the more useful distinction is between electioneering and election-protection material, we think special rules for distribution of materials are not helpful.

We define “election-protection activity” to include non-coercive and nonpartisan: observation of election activities; education of the voter (through verbal or printed matter) about his or her rights and responsibilities; and assistance to voters attempting to understand and exercise their right to vote. As noted above, we define election-protection activity to be exclusive of “electioneering.” Election-protection activity also excludes any legally mandated assistance provided by district board workers. *See, e.g.*, N.J.S.A. 19:12-7.1 (voters’ bill of rights to be posted at polls); N.J.S.A. 19:15-18.2 (handout to be given to voter after successful challenge).⁴

Given the foregoing framework, we offer the following recommendations:

1. First, in accordance with state law, all “electioneering” as defined above must be prohibited inside the polling place and within 100 feet of the entrance from the outdoors into the building housing the polling place. Even though this is a content-based restriction on political speech, subject to the strictest of constitutional scrutiny, a similar Tennessee law has been upheld by the United States Supreme Court against constitutional challenge. *See* [*Burson v. Freeman*](#), 504 U.S. 191 (1992).

we learned following 2004, random selection of voters at the polling place is the most important part of the process, and arguably the most susceptible to problems.

When a voter refuses to participate, the interviewer is instructed to record their gender, race and approximate age. These data allow the exit pollsters to do statistical corrections for the bias in gender, race and age that might result from refusals.

The selected voters receive a one-page paper questionnaire to fill out. In the past, the questionnaire included approximately 25 questions (see an example from the 2004 exit polls), although this year the exit pollsters have worked to prepare a shorter questionnaire. Respondents fill out the survey privately then place it in a clearly marked “ballot box” so they know their identities cannot be tracked and their answers remain confidential.

⁴ We note that election-protection activity (such as observation) conducted inside polling places by persons possessing challengers’ badges is governed by the laws regulating challengers and their conduct. N.J.S.A. 19:7-1 *et seq.*

2. For the reasons stated above, we do not offer a specific recommendation on the issue of “entry polling.” However, to the extent that “entry polling” is not electioneering, loitering, or obstructing, interfering, threatening, or coercing voters, we do not discern a statutory basis for prohibiting it.

3. Both election-protection activity and “exit polling” should be allowed outside of the polling place or room, but within 100 feet from its entrance (regardless of whether such location is indoors or outdoors).

Regarding activity inside the polling place or room: given N.J.S.A. 19:15-8(a), election observation by election-protection workers with challenger credentials can occur inside the polling place. However, since persons with challengers’ badges are not permitted to interact with voters (*see* <http://www.state.nj.us/lps/elections/co-polling-posters/Eng-parts-1-2/poll-place-poster--2--3.24.06.pdf>, “Challengers Do’s and Don’ts”), neither exit polling nor written or verbal counseling can be conducted inside the polling place or room.

With regard to activity outside the polling place or room, our careful review of the applicable statutes shows that neither exit polling nor legitimate election-protection work is “electioneering” because such work is not “for [or against] any candidate, party or public question.” Nor can such activities be viewed as “obstructing” or “interfering” with voters or “loitering” under the plain meaning of these words from N.J.S.A. 19:34-6(a), nor is it the kind of partisan work proscribed by N.J.S.A. 19:34-15. In addition, neither exit polling nor legitimate election-protection work can be fairly understood to constitute voter interference, intimidation, threats, or coercion, under N.J.S.A. 19:34-1.1, or -11, or 42 U.S.C. § 1973i(b).

For similar reasons, the prohibition of N.J.S.A. 19:34-7 against “solicit[ing]” voters cannot be read to bar either exit polling or election-protection activity. The penal laws do not and cannot punish such nonpartisan, non-profit, and press-related activities as a request for a voter to say voluntarily how he or she voted, a request about whether the voter experienced any problem voting, or an offer to assist a voter with learning his or her rights and responsibilities. The criminal law punishes “soliciting” when it is tied to a monetary or commercial exchange, violence, or independently unlawful conduct.

Statutes regulating speech, especially penal ones, even if constitutionally permissible, must be drawn narrowly and with specificity. We do not believe the State has any statutory prohibitions against exit polling or election-protection work conducted outside the “polling place or room,” nor should any be inferred from its existing laws.

We conclude that, in the absence of any State law prohibiting election-protection work conducted outside the polling place, the county boards may not invent such a restriction. Of course, since the owner or administrator of a building has the right under the trespass laws to exclude unauthorized persons, this right to engage in exit polling and election-protection activity outside the polling place or room, but elsewhere on the premises, remains subject to the building owner’s/administrator’s discretion, which must be exercised on a nondiscriminatory and

nonarbitrary basis (as, preferably, delineated by prior agreement between the Board of Elections and the building owner/administrator).

Of course, neither exit polling nor election-protection work may include “obstructing the entrance” to the polling place.

We read *Burson* and other federal precedents as allowing such a framework, i.e., prohibiting electioneering while allowing election-protection activity. *Burson* specifically recognized that charitable activity can be allowed while at the same time banning electioneering. Because conducting “voter education activities (including . . . publishing voter education guides) conducted in a non-partisan manner” is a recognized charitable activity, *see* <http://www.irs.gov/charities/charitable/article/0,,id=163395,00.html> (last visited November 15, 2006), we do not see any constitutional impediment to allowing nonpartisan voter education activity, while barring electioneering.

We also note that a Florida statute banning exit polling near polls was recently declared to be violative of the First and Fourteenth Amendments. *See CBS Broadcasting, Inc. v. Cobb*, No. 06-22463 (S.D. Fla. Oct. 24, 2006) (order declaring Florida exit-poll statute invalid). We see no reason why the rationale and result of that case would not apply here.

We recognize the problems inherent in enforcing the State’s ban on electioneering within 100 feet of the outdoor entrance to the poll building, while permitting election-protection activity and exit polling anywhere outside the “polling place or room” as defined above. If exit polling, the distribution of election-protection material or verbal election-protection counseling is permitted, while electioneering is prohibited, the minimally trained officials of the more than 6,000 district boards in this state (each of which has law enforcement and imprisonment powers under N.J.S.A. 19:6-15 and -30 but which do not generally have the ability to seek legal counsel from an on-site Deputy Attorney General) will be in the position of (1) understanding and mastering the different geographical restrictions on each type of conduct; and (2) having to ascertain whether materials distributed or counseling given constitute improper partisan attempts at electioneering or permissible nonpartisan election-protection activity and speech. It is entirely foreseeable that perceptions of such activity, viewed through a prism of partisanship, may result in false accusations of electioneering (a serious charge of a third-degree crime). Unscrupulous persons may also take advantage of such a framework by masquerading as election-protection personnel while they are in fact electioneering.⁵ Likewise, the exercise of such discretion may result in improper enforcement against permissible election-protection activity as well as failure to ensure that those engaged in electioneering remain clear of the 100-foot zone. Both improper enforcement efforts and failure to remove persons engaging in electioneering, if committed by a board worker, constitute criminal offenses under N.J.S.A. 19:34-48 and a civil rights violation remediable under 42 U.S.C. § 1983.

⁵ The fact that such activity would be a third-degree crime provides minimal, but not substantial, deterrence, as such offenses are rarely prosecuted.

Despite these risks, however, we do not believe that existing state law authorizes the prohibition of election-protection activity anywhere outside the polling place or room, so long as the entrance is not obstructed and generally applicable laws on trespass are not violated. In fact, enforcing a nonexisting prohibition would harm voters who, according to the evidence we have seen, are greatly benefited by vigilant election-protection activities.⁶

We also believe that it would be undesirable, and probably unconstitutional, to have the State engage in a prepublication review of the proposed material to be handed out, perhaps allowing some while censoring others. Such an approach had been suggested in a September 13, 2006, draft directive from your office. Our view is that even if the State had the resources and the willingness to navigate the policy thickets created by such a review, it is likely that such a prior review would not withstand the strict constitutional scrutiny that would ensue.

We offer two additional suggestions for your consideration: First, to reduce the difficulty of distinguishing election-protection from electioneering, you may wish to consider requesting election-protection participants to wear a badge identifying themselves as such and stating their affiliation with a non-partisan organization, if any. However, requiring such persons to preregister or to state their name(s) would, in our view, be impermissible. Cf. [*McIntyre v. Ohio Elections Comm'n*](#), 514 U.S. 334 (1995) (acknowledging the right to engage in anonymous elections advocacy).

In addition, as a general matter, we support efforts to enhance voter education, such as universal distribution of a document like the Division of Elections' *Voter Bill of Rights*, and note that education of voters to protect themselves from threats to their exercise of the franchise will go far in advancing the goals that election-protection groups seek to achieve.

Thank you for the opportunity to comment on these matters. We are at your disposal to discuss the important issues they raise.

Very truly yours,



Ronald K. Chen
Public Advocate

cc: Anne Milgram, Esq., First Assistant Attorney General
Jason Orlando, Esq., Deputy Attorney General

⁶ Even if a New Jersey statute expressly barring election-protection activities within some area near the polls had been passed by the Legislature, we note that a such a ban would still have to withstand the strict constitutional scrutiny applicable to such a content-based restriction.