DEBRA BOWEN | SECRETARY OF STATE
STATE OF CALIFORNIA | ELECTIONS
1500 11th Street, 5th Floor | Sacramento, CA 95814 | Tel (916) 657-2166 | Fax (916) 653-3214 | www.sos.ca.gov

May 7, 2012

County Clerk/Registrar of Voters (CC/ROV) Memorandum #12144

TO: All County Clerks/Registrars of Voters

FROM: Jana M. Lean
Jana M. Lean
Chief, Elections Division

RE: Presidential Primary Election: Electioneering

"Electioneering" is defined in California Elections Code section 319.5 as "the visible display or audible dissemination of information that advocates for or against any candidate or measure on the ballot within 100 feet of a polling place, an elections official's office, or a satellite location under Section 3018." This effectively means electioneering cannot be conducted within 100 feet of the entrance to the polling place. Prohibited materials and information include, but are not limited to:

- A display of a candidate's name, likeness, or logo
- A display of a ballot measure's number, title, subject, or logo
- Buttons, hats, pencils, pens, shirts, signs, or stickers containing information about candidates or issues on the ballot
- Any audible broadcasting of information about candidates or measures on the ballot

The Elections Code provides penal provisions for anyone who engages 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 2010 Poll Worker Training Standards, located at www.sos.ca.gov/elections/pdfs/poll-worker-training-standards-final-031210.pdf, encourages county elections officials to ensure poll workers are trained on the issue of electioneering.

Poll workers must understand how to measure a 100-foot perimeter from a polling place (or request assistance from roving inspectors), what activities are prohibited within that perimeter, and what to do if they either see or hear about electioneering 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 what to do, if, for example, a voter enters a polling place wearing a t-shirt or button promoting or opposing a candidate or ballot measure.

The California Secretary of State's Voter Fraud Protection Handbook is available at www.sos.ca.gov/elections/vfph-2009.pdf and it provides information on this topic. 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)

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. Elections Code section 319.5, which now defines "electioneering," was not added until 2009, so it was not available to the court in 1998. However, the 1998 court did a good job of framing the issues involved, denying 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.
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> "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.
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> "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.
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> "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, please feel free to contact me at Jana.Lean@sos.ca.gov or (916) 657-2166.