



DEBORAH A. JEON
LEGAL DIRECTOR

February 12, 2009

Ms. Linda H. Lamone,
State Administrator of Elections
Maryland State Board of Elections
P.O. 6486
Annapolis, MD 21401-0486

Ms. Dorothy Kaetzel
Election Director
Washington County Board of Elections
35 W. Washington Street, Room 101
Hagerstown, MD 21740-4833

AMERICAN CIVIL
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Re: Electioneering buffer zone

OFFICERS AND DIRECTORS
SARA N. LOVE
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

C. CHRISTOPHER BROWN
GENERAL COUNSEL

Dear Ms. Lamone and Ms. Kaetzel:

We write on behalf of the American Civil Liberties Union of Maryland and Sharpsburg resident Paul Thompson, Jr., to raise concerns about the Washington County Election Board's application of MD. CODE ANN., Election Law § 16-206(b) (2003)¹ to Mr. Thompson's private property. On Election Day in 2008, Washington County election officials employed this law, which prohibits electioneering within 100 feet of the entrance and exit of a polling place, to remove and vandalize political yard signs that Mr. Thompson had posted on the lawn of his private residence. For the reasons outlined below, we believe that application of the law in this context was unconstitutional, and ask you to take formal action to ensure that it will not happen again.

Mr. Thompson lives across the street from Potomac Valley Fire Department, a polling place in Sharpsburg, Maryland. Throughout the weeks preceding the election, Mr. Thompson displayed four political yard signs on his property, within 100 feet from the entrance and exit of the Fire Hall. Upon arriving at his home on November 4, 2008 (Election Day), he noticed that two of

¹ This law provides, in relevant part:

(1) At each polling place, one election judge from each principal political party . . . shall post signs delineating a line around the entrance and exit of the building that are closest to that part of the building in which voting occurs.

(2) The line shall be located as near as practicable to 100 feet from the entrance and exit and shall be established after consideration of the configuration of the entrance and the effect of placement on public safety and the flow of pedestrian and vehicular traffic.

(3) The signs shall contain the words "No Electioneering Beyond this Point".
MD. CODE ANN., Election Law § 16-206(b)(1)-(3).

the signs had been vandalized and two were missing. As he re-hung one sign, Election Judge Frances Tucker approached Mr. Thompson and informed him that if he continued, she would “tear the signs down again.” Following a verbal dispute between Mr. Thompson and Ms. Tucker, a Sheriff’s Deputy was called to the scene and compelled Mr. Thompson to remove the remaining two political yard signs.

While we understand that a splintered Supreme Court upheld a 100-foot electioneering buffer as applied to public property, we do not believe that the government can constitutionally extend this prohibition to private property, notwithstanding the informal 1986 and 1990 AG Advice Letters opining to the contrary.² *Burson v. Freeman*, 504 U.S. 191 (1992).

The Supreme Court’s plurality opinion in *Burson* approved a Tennessee statute that “prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place.” Notably, however, *Burson* dealt with a statute that restricted speech in “quintessential public forums,” and not on private property. *Id.* at 196. The plurality’s reasoning makes clear that the problem it was focused upon was active electioneering that might otherwise occur within a public forum, as voters walked to and from the polls. This justification simply has no force where private property like Mr. Thompson’s is concerned, because voters do not approach the polls by traversing his private property.

Mr. Thompson enjoys the right under the First and Fourteenth Amendments – equally with all other private residents -- to display political signs on his own private property. A unanimous Supreme Court ruled in *City of Ladue v. Gileo*, 512 U.S. 43 (1994), that it was unconstitutional for the government to interfere with political lawn signs on private property in *Ladue*, even though the Court had previously upheld a government ordinance prohibiting display of political signs on public property. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). While *Ladue* did not deal with residences located within an electioneering buffer zone, according different speech rights to similarly situated residents based upon the location of their property would raise equal protection concerns.

The few courts that have addressed this precise issue have found it improper to apply electioneering restrictions to private property. One such case is *Calchera v. Procarione*, 805 F. Supp 716, 720 (E.D. Wis. 1992). There, homeowners living across the street from a polling place challenged a Wisconsin statute that banned electioneering within 500 feet of any polling place on Election Day, indiscriminately covering both public and private property. The court distinguished the Tennessee statute considered in *Burson* -- which encompassed only “sidewalks and streets” -- from the one in Wisconsin which included “private residences as well.” *Id.* For this reason, the *Calchera* court found that the

² These advice letters – copies of which are attached -- pre-date much of the relevant case law on this issue, and do not include citation to legal authority in support of their conclusions, and so are of limited use in analyzing the matter.

Wisconsin statute was not narrowly tailored to the state's interests in preventing voter intimidation and election fraud. "This is not a case where the legislature is regulating expression in a public forum," the court wrote. The Wisconsin law, "with its sweeping zone of protection, prohibits individual homeowners from expressing their political views *on their own property*." *Id.*; accord, *Clean-up '84 v. Heinrich*, 759 F.2d 1511, 1513-4 (11th Cir. 1985) ("Among other reasons, the district court found the statute overbroad because the 100-yard radius at some polling sites included private homes and businesses 'where the gathering of signatures could impose no threat to the voting process.'") Also see *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004.) (discussing inadequacy of private property exception in Kentucky buffer zone law.) In one case, a court upholding an electioneering buffer zone mentioned as one justification for its decision the fact that the zone was not being applied to private property. *Schirmer v. Edwards*, 2 F.3d 117, 122 n.12 (5th Cir. 1993.)

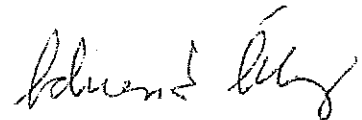
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LIBERTIES UNION OF
MARYLAND

For these reasons, we believe that application of Maryland's electioneering buffer to Mr. Thompson's private property on Election Day was improper, and should not be repeated in the future. Please contact us to let us know your thinking on the matter.

Sincerely,



Deborah A. Jeon
Legal Director



Adrián E. Alvarez
Law Clerk

Cc: Mr. Paul Thompson
Ms. Sandra B. Brantley, Counsel, Maryland State Board of Elections
Mr. Roger Schlossberg, Attorney, Washington County Board of Elections
Mr. William F. Brockman, Deputy Solicitor General, State of Maryland
Mr. Douglas W. Mullendore, Sheriff, Washington County, Maryland
Enclosure

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL
JUDSON P. GARRETT, JR.
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BALTIMORE & LOCAL CALLING AREA 841-3889
WASHINGTON METROPOLITAN AREA 858-3889
TTY FOR DEAF - ANNAPOLIS 841-3814 - D.C. METRO 858-3814

September 19, 1990

The Honorable Samuel C. Linton
Box 110 Holly Springs Road
Nanjemoy, Maryland 20662

Dear Delegate Linton:

You have asked for advice about the scope and enforcement of Article 33, §24-23(a)(4)(ii), which prohibits the posting of campaign material within a 300-foot radius of a polling place in Charles County. Specifically, you have asked whether the prohibition applies to signs on private property within 300 feet of the polling place, and if so, whether an election judge has authority to enter on private property to remove the sign. It is my view that Article 33, §24-23(a)(4)(ii) applies to all property, public and private, within 300 feet of the polling place. In addition, while I have found no cases addressing the powers of election judges in these circumstances, the better practice would be to instruct the property owner, the candidate, or the campaign staff to remove the sign, and/or to alert the police to the violation of law.

Article 33, §24-23(a)(4)(ii) provides:

"The following offenses shall be punished as in this section provided.
For any person:

(4)(ii) In ... Charles ... [county], to canvass, electioneer, or post any campaign literature or material on election day in a polling place or within a 300 foot radius from the entrance and exit of the building closest to that part of the building in which voting occurs.

The plain language of this section indicates that all property within 300 feet is covered, whether public or private. In

JAMES W. JOHNSON, JR., *Chairman*
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MARIE M. GARBER
Administrator

STATE ADMINISTRATIVE BOARD
OF
ELECTION LAWS
P.O. BOX 231
ANNAPOLIS, MARYLAND 21404-0231

October 30, 1986

Mr. John W. Ashbury
Ashbury Management
P. O. Box 386
Walkersville, MD 21793-0386

Dear Mr. Ashbury:

This is in response to questions raised in your letter to me dated September 11, 1986, a copy of which reached me yesterday. The original letter was not received, and I only realized such a letter had been written when you telephoned early this week.

I have consulted with Assistant Attorney General Linda Lamone and she tells me that it is within the authority of the Frederick County Board of Supervisors of Elections to take action to remove, or seek to have removed, a campaign sign which is posted within 100 feet of the door to a building in which a polling place is located. It does not matter that the sign is posted on private property, nor that it may be in a window of a private residence or on a private automobile. This same question was raised in Baltimore City with respect to a campaign sign posted within the 100-foot limit in the window of a building; when the person in charge of the building was notified to remove the sign and he refused to do so, he was arrested, convicted and fined for violating the provision of Maryland law which bans electioneering in the area around a polling place.

Sincerely,

(Mrs.) Marie M. Garber, Administrator

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

MMG/kbs

CC c/ incoming:

Board of Supervisors of Elections for Frederick County
Lawrence A. Dorsey, State's Attorney, Frederick County
Linda Lamone, Assistant Attorney General