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Attorney for Plaintiffs

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft &  
John Dickinson

Plaintiffs

v.

Chet Harhut, Individually and in  
his capacity as Commissioner, Bureau of  
Commissions, Elections and Legislation,  
Pennsylvania Department of State;  
Pennsylvania Department of State;  
Pedro A. Cortes, Individually and in  
his capacity as Secretary of the  
Commonwealth of Pennsylvania

Defendants.

ELECTION LAW MATTER

NO. 451 MD 2008

RECEIVED & FILED  
COMMONWEALTH COURT  
OF PENNSYLVANIA  
2008 SEP 18 P 1:54

Application for Expedited Consideration of an Election Case


Plaintiffs, Richard Kraft and John Dickinson, by their attorney, Linda A. Kerns, Esquire, hereby request Expedited Consideration of their Complaint for Declaratory Judgment, and aver as follows:

1. The Commissioner of the Commonwealth's Bureau of Commissions, Elections and Legislation illegally advised, via written memorandum, all Pennsylvania local County Board of election officials that they could allow voters to enter polling places on November 4, 2008 while wearing t-shirts, stickers, buttons or other partisan paraphernalia endorsing specific candidates or political parties.

2. Pennsylvania law prohibits the conduct endorsed by the aforementioned memorandum. The applicable statute states, in pertinent part: "No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by the act. 25 P.S. § 3060 (c).
3. The popular press reported on the aforementioned memorandum so that the illegally issued, erroneous advice has become entrenched in the public conscience.
4. The Complaint requests that the Defendants rescind and make null and void the September 8, 2008 Memorandum and communicate said rescission to all parties who received the communication.
5. The Complaint also requests that the Court issue an order prohibiting the Department of State from disseminated unauthorized and legally erroneous opinions regarding the Pennsylvania Election Code.
6. The Complaint also requests that the Court direct the Judges of Elections to enforce the Pennsylvania Election Code.
7. A true and correct copy of the file stamped Complaint for Declaratory Judgment is attached as Exhibit 1.
8. The subject matter of the complaint encompasses important issues, affecting the health, safety and welfare of citizens of the Commonwealth.
9. The clock is ticking, as the Election is scheduled for November 4, 2008, only forty-seven (47) days away.
10. Time is of the essence as the erroneous information must be rescinded in advance of the election and election board members in each of the Commonwealth's polling places need to have a clear statement of the law that they must enforce.
11. Plaintiffs are in need of the Court's immediate assistance in this matter.

Wherefore, Plaintiffs respectfully request that this Court consider this matter on an expedited basis.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'L. Kerns', written over a horizontal line.

Linda A. Kerns, Esquire  
September 18, 2008



**LINDA A. KERNS, ESQUIRE**  
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Attorney for Plaintiffs

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**Richard Kraft &  
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**Plaintiffs**

v.

**Chet Harhut, Individually and in  
his capacity as Commissioner, Bureau of  
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Pennsylvania Department of State;  
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Pedro A. Cortes, Individually and in  
his capacity as Secretary of the  
Commonwealth of Pennsylvania**

**Defendants**

**: ELECTION LAW MATTER**

**: NO. 451 MD 2008**

**CERTIFICATE OF SERVICE**

I, Linda A. Kerns, Esquire, do hereby certify that I caused to be served on September 18, 2008, true and correct copies of the Plaintiffs' Application for Expedited Consideration of an Election Case, via overnight mail service and/or hand delivery, upon the following:

Pennsylvania Department of State  
305 North Office Building, Harrisburg, PA 17120

Pedro Cortez, Secretary of the Commonwealth  
305 North Office Building, Harrisburg, PA 17120

Chet Harhut, Deputy Commissioner Bureau of Commissions, Elections and  
Legislation, 305 North Office Building, Harrisburg, PA 17120

  
9.18.08  
\_\_\_\_\_  
Linda A. Kerns, Esquire

**LINDA A. KERNS, ESQUIRE**

*Attorney ID No. 84495*

Attorney for Plaintiffs

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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his capacity as Commissioner, Bureau of  
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**ELECTION LAW MATTER**

NO. 451 MB2008

RECEIVED & FILED  
COMMONWEALTH COURT  
OF PENNSYLVANIA  
18 SEP 2008 09 50

Ex 1

**COMPLAINT**  
**DECLARATORY JUDGMENT**

Plaintiffs, Richard Kraft and John Dickinson by their attorney, Linda A. Kerns, Esquire, bring this action against defendants, Chet Harhut, Individually and in his capacity as Commissioner, Bureau of Commissions, Elections and Legislation, Pennsylvania Department of State; Pennsylvania Department of State; and Pedro A. Cortes, Individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, and in support thereof, aver as follows:

**INTRODUCTION**

1. This action is necessary because the Commissioner of the Commonwealth's Bureau of Commissions, Elections and Legislation illegally advised, via written memorandum, all Pennsylvania local County Boards of election officials that they could allow voters to enter polling places on November 4, 2008 while wearing t-shirts, stickers, buttons or other paraphernalia endorsing specific candidates for office. "). (A copy of the Memorandum is attached hereto as Exhibit 1). This type of "electioneering" is prohibited by Pennsylvania law and has been disallowed for over a century.

2. Chet Harhut, Commissioner, Bureau of Commissions, Elections and Legislation, for the Department of State of the Commonwealth of Pennsylvania, ("Department of State") issued a memorandum on September 8, 2008 to all County Boards of Election purporting to define "electioneering" as used the Pennsylvania Election Code, 25 P.S. Section 3060(c), and specifically stating: "if such



electioneering remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute 'electioneering'. . . ." (the "Memorandum). This statement is internally self-conflicting and would be impossible to enforce in a uniform manner as it is open to innumerable interpretations.

3. The Memorandum was prompted by an August 14, 2008 letter from the American Civil Liberties Union of Pennsylvania ("ACLU Letter"), requesting that the Secretary of the Commonwealth of Pennsylvania provide a written opinion to the county boards of elections clarifying that voters be permitted to "wear t-shirts, stickers, and buttons endorsing candidates for office" in the polling place. (A copy of the ACLU letter is attached hereto as Exhibit 2). However, the Pennsylvania Election Code, 25 P.S. § 3060 (c) states: "No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act."

4. Plaintiff seeks a declaration that the Pennsylvania Election Code prohibits electioneering, passive or otherwise, inside a polling place.

### PARTIES

5. Plaintiff, Richard Kraft is a Pennsylvania resident residing in Bethel Park, Pennsylvania where he serves as a Judge of Elections in Pennsylvania.

6. Plaintiff, John Dickinson is a Pennsylvania resident residing in Pittsburgh, Allegheny County, Pennsylvania where he serves as a Minority Inspector of Elections.

7. Defendant, Pennsylvania Department of State is a Pennsylvania government entity with an office located at 305 North Office Building, Harrisburg, Pennsylvania, 17120.

8. Defendant Pedro A. Cortes, the Secretary of the Commonwealth, has an office located at 305 North Office Building, Harrisburg, Pennsylvania, 17120.

9. Defendant, Chet Harhut, Deputy Commissioner, Bureau of Commissions, Elections and Legislation, has an office located at 305 North Office Building, Harrisburg, Pennsylvania, 17120.

#### VENUE

10. Exclusive jurisdiction over the subject matter of this Complaint is vested in the Commonwealth Court of Pennsylvania by the provisions of the Judicial Code, 42 Pa. C. S. A. § 761(a)(1).

#### BACKGROUND

11. A general election is scheduled for November 4, 2008 at which registered voters of the Commonwealth of Pennsylvania will cast ballots for several offices, including the President of the United States, Representative to the United States Congress, 203 seats of the Pennsylvania House of Representatives, 25 seats of the Pennsylvania Senate, certain Commonwealth Constitutional Officers and also for Statewide Ballot Referendums

12. The citizens of Pennsylvania have an interest in secure and peaceful elections, providing each voter the opportunity to vote as he/she so desires, in a system conducted with uniformity across the Commonwealth. Indeed, the Constitution of the Commonwealth of Pennsylvania, in the section on Election and Registration Laws, specifically states: "All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State . . ." Article VII, Section 6.

### **The Pennsylvania Election Code Governs Conduct at Polling Places**

13. Pennsylvania law governs conduct of both election officials and voters at polling places. The relevant provision of the Election Code, long the law of the Commonwealth, states:

#### **§ 3060. Regulations in force at polling places**

(a) Until the polls are closed, no person shall be allowed in the polling place outside of the enclosed space at any primary or election, except the watchers, voters not exceeding ten at any one time who are awaiting their turn to vote, and peace officers, when necessary for the preservation of the peace. No elector shall be allowed to occupy a voting compartment or voting machine booth already occupied by another, except when giving assistance as permitted by this act.

(b) No elector, except an election officer, clerk, machine inspector or overseer, shall be allowed to re-enter the enclosed space after he has once left it, except to give assistance as provided by this act.

(c) No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act.

(d) All persons, except election officers, clerks, machine inspectors, overseers, watchers, persons in the course of voting, persons lawfully giving assistance to voters, and peace and police officers, when

permitted by the provisions of this act, must remain at least ten (10) feet distant from the polling place during the progress of the voting.

(e) When the hour for closing the polls shall arrive, all qualified electors who have already qualified, and are inside the enclosed space, shall be permitted to vote; and, in addition thereto, all those qualified electors who are in the polling place outside the enclosed space waiting to vote and all those voters who are in line either inside or outside of the polling place waiting to vote, shall be permitted to do so, if found qualified.

(f) It shall be the duty of the judge of election to secure the observance of the provision of this section, to keep order in the voting room, and to see that no more persons are admitted within the enclosed space than are permitted by this act. The judge of election may call upon any constable, deputy constable, police officer or other peace officer to aid him in the performance of his duties under this section. 25 P.S. § 3060.

14. Traditionally, election officials have prohibited voters from entering polling places while wearing t-shirts, stickers, buttons or other paraphernalia endorsing specific candidates for office, acting in accordance with section (c) of the above referenced statute, which states: "No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act," This enforcement of the Pennsylvania Election Code has long protected our citizens' health, safety and welfare, and is designed to ensure the public's confidence in the electoral process.

### **Polling Places Should Be Free from Persuasion**

15. The reasons for keeping polling places free from persuasion, coercion or undue influence are obvious and have long been the law in this Commonwealth, and indeed in our Nation, as we consider voting rights to be the cornerstone of our democracy.

16. Maintaining our polling places as partisan-free safe harbors ensures each voter may exercise this most sacred of constitutional rights without danger of intimidation or confusion, especially because voters milling about a polling place may be indistinguishable from election officials stationed within. Preventing all those who enter the sanctuary of polling places from electioneering or soliciting votes once within that safe harbor establishes a bright line rule, without the potential jeopardy of obfuscation arising from different ad hoc decisions made by local election officials, from polling place to polling place. A voter in Clarion, Allegheny County, should be subject to the identical protections, and restrictions, as a voter in Aliquippa, Beaver County, or in the City of Philadelphia, Philadelphia County or anywhere else in our Commonwealth.

### **Pennsylvania Election Code Prohibits Electioneering**

#### **Within a Polling Place**

17. The statute states: "No person, when within the polling place, shall electioneer or solicit votes. . . ." Such broad and forceful language clearly prohibits all electioneering, notably without excluding a specific type, be it passive or otherwise. Drafters used the word "shall," traditionally a word expressing determination and certainly not ambiguity. The Supreme Court of Pennsylvania

has noted that the word “shall” carries an “imperative or mandatory meaning.” *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223 (Pa. 2004); see also BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) (“In common or ordinary parlance, and in its ordinary signification, the term “shall” is a word of command, and one which has always or which must be given compulsory meaning; as denoting obligation. The word in ordinary usage means ‘must’ and is inconsistent with a concept of discretion.”). Similarly, in *In re: Nomination of Flaherty*, 770 A.2d 327, 332 (Pa. 2001), when interpreting the language as used in the Pennsylvania Election Code (“Election Code”), the Pennsylvania Supreme Court cited to *1 Pa.C.S. § 1921(b)*, which states: “When interpreting statutes, we note that if ‘the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.’” The *Flaherty* court specifically found that the word “shall” must be interpreted as a mandate given the “. . . importance of insuring the integrity of the election process. . .” 770 A.2d 327, 332. Accordingly, the Pennsylvania Supreme Court refused to apply a “relaxed standard” when interpreting the provisions of the Election Code. *Id.* at 336.

18. To protect our inviolable rights, the term “electioneering” should be defined and interpreted broadly, as the legislature intended, not narrowly, to allow anomalies that could rise to the level of a partisan free-for-all in the sanctuary of our Commonwealth’s polling places.

## **Time and Again Our Courts have Prohibited Even Passive Electioneering**

19. Courts have attempted to define electioneering in a variety of contexts. In *Western Psychiatric Institute and Clinic of the University of Pittsburgh of the Commonwealth System of Higher Education v. Commonwealth of Pennsylvania, Pennsylvania Labor Relations Board*, 16 Pa. Cmwlth.204, 330 A.2d 257 (1974), the Commonwealth Court of Pennsylvania found that a Union organizer seen in the building wearing a campaign button was clearly electioneering.

20. In the case of *Marlin v. District of Columbia Board of Elections & Ethics*, 236 F. 3d 716 (C.A.D.C. 2001), held that a county board of elections could prevent a voter from voting if the voter wore a sticker supporting a candidate. *Id.* at 720. The plaintiff had been prohibited from voting in a primary election while wearing a sticker supporting a candidate, since the board of elections believed wearing a sticker violated election regulations prohibiting political activity which interferes with the orderly conduct of elections and defining political activity as “any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting.” *Id.* at 718.

### **Pennsylvania Department of State issued an Erroneous and Misleading Memorandum to the County Boards of Election**

21. On or about September 8, 2008, Chet Harhut, Commissioner, Bureau of Commissions, Elections and Legislation, for the Department of State of the Commonwealth of Pennsylvania, issued the Memorandum to all County Boards of Election in Pennsylvania on the subject of Passive Electioneering.

22. The Memorandum incorporated a letter dated August 14, 2008 from the American Civil Liberties Union of Pennsylvania sent to Pedro A. Cortes, the Secretary of the Commonwealth of Pennsylvania (the "Letter"). See Exhibit 1.

23. The Letter urges the Secretary to adopt an impermissibly "narrow definition of the term 'electioneer'" so that voters would be permitted to "wear candidate t-shirts, buttons, stickers, and similar items into the polling place in order to cast their votes." The defamation being promoted by the ACLU violates the Pennsylvania Election Code.

24. The ACLU Letter requests that a written opinion be disseminated to the county boards of elections, advocating the position of the ACLU.

25. Significantly, the ACLU, as defined on its website [www.aclupa.org](http://www.aclupa.org), is purportedly a "nonprofit, nonpartisan organization" made up of two organizational entities: the ACLU and the American Civil Liberties Foundation, a 501(c) nonprofit corporation. Thus, the ACLU is simply an entity, no better or worse than any other and has no specific authority in the Commonwealth of Pennsylvania, by statute or otherwise.

26. The Pennsylvania Department of State adopted the position in the ACLU Letter and sent it to all Pennsylvania County Boards of Elections, carving out a heretofore nonexistent "passive electioneering" exception to the statute, usurping not only our elected legislators but also encroaching on the authority of the Commonwealth Court. This exception promoted by the Department of State violates the Election Code.



27. Ensuring that our polling places are “electioneering free zones” preserves the peace by preventing not only intimidation, but also the contentiousness that can arise from a citizen, waiting patiently to vote, being sandwiched between other persons politicizing the process, creating a tinder box of rabbleroxing. For this very reason, our Legislature prohibited all electioneering: passive, aggressive, verbal, non-verbal, soft, loud, or otherwise.

28. Allowing individual, so-called passive electioneering also permits large scale, coordinated so-called passive electioneering. If passive electioneering is condoned, nothing would prevent a partisan group from synchronizing a battalion of like-minded individuals, sporting political accoutrements, to descend on a polling place, presenting a domineering, united front, certain to dissuade the average citizen who may privately hold different beliefs.

29. Expressly allowing so-called passive electioneering also encourages stepped up intimidation in the penumbra of polling places. Green-lighting the wearing of buttons, hats, T-shirts and other partisan accessories inside a polling place implicitly authorizes champions of one party or another to stand outside and outfit passers-by. Otherwise unadorned voters are then encouraged to participate in so-called passive electioneering, which on a grand scale rises to the level of overreaching intimidation in a place that has traditionally been free of politicizing.

30. The Department of State was without jurisdiction or authority to interpret *sua sponte* a statute and then broadcast that position to election officials as if it is the settled law of this Commonwealth.

**The Misleading and Erroneous Memorandum has been  
Reported in the General Press**

31. Subsequently, the *Philadelphia Inquirer*, and then the Associated Press, reported on the Memorandum, with headlines such as "Voters can wear campaign buttons to polls, Pa. says." Attached hereto and made a part hereof as Exhibit 3 is a true and correct copy of just one of the articles appearing in the press. Thus, a piece of correspondence written by an ACLU staff attorney has risen to the level of the law of this Commonwealth, in the eyes of the press, and, presumably, the general public and district election board members.

32. Apparently, recognizing the threat to the electoral process caused by the misleading and inaccurate Memorandum, Chet Harhut of the Department of State sent out an email to County Election Officials (the "Email") requesting that individual counties discuss the Memorandum and Letter with their solicitors, along with a U.S. Supreme Court case, *Burson v. Freeman*, 504 U.S. 191 (1992) suggesting that each county may want to pass a resolution. Attached hereto and made a part hereof as Exhibit 4 is a true and correct copy of the Email. Thus, in a matter of weeks, County Election Officials received a Memorandum, Letter and Email regarding "electioneering" in polling places which, although prohibited by statute, has now been bandied about in a virtual echo chamber of uncertainty.

33. Unfettered electioneering within a polling place, even if some may consider it "passive," will lead to chaos, confusion and non-uniformity in our Pennsylvania polling places. This enforcement of the Pennsylvania Election Code

has long protected our citizens' health, safety and welfare, and is designed to ensure the public's confidence in the electoral process.

### **Issues have Plagued Polling Places in the Commonwealth**

34. By way of example, Allegheny County, in particular, faces a plethora of partisan election problems, in part as cited in the ACLU Letter and in part for reasons very different than those raised by the ACLU Letter. Plaintiffs believe, and therefore aver, that election judges at many polling places in Allegheny County, and likely in other counties as well, have attempted to enforce the statute so that there is a level playing field where every voter can cast their ballot in peace. However, in the past, partisans have set up shop directly outside polling places, distributing buttons and badges, creating a virtual parade of voters, ornamented with the images of the candidate of their choice. Those voters then proceed into the polling place, as walking billboards for the candidate of their choice, encouraged by those stationed outside to continue the electioneering within the actual voting area. While the gauntlet of electioneering outside the polling can often be aggressive and overbearing, all voters are guaranteed by the statute that once he/she reaches the inside of the polling place they shall be free from persuasion and electioneering, passive or otherwise. The practice of any form of electioneering, including the so-called passive electioneering, while arguably permissible outside is not allowed by statute to enter the safe holder world of the polling place.

35. Upon information and belief, complaints have been made by at least one Inspector of Elections and Judge of Elections in Allegheny County to the

Allegheny County Board of Elections about the practice of electioneering described herein during the primary election held on April 22, 2008. However, despite such complaints, a representative of the Allegheny County Board of Elections stated that voters were permitted to wear a candidate's shirt, button or sticker into the voting booth.

36. Upon information and belief, despite the fact that "passive electioneering" is open and notorious at several polling places in Allegheny County, at other polling places in Allegheny County, voters are expressly forbidden from entering polling places while wearing any badge, sticker, button or shirt that either endorses or promotes a candidate for political office.

37. Plaintiffs believe, and therefore aver, that the enforcement of the statutory ban on any type of electioneering inside the polling place has not been uniformly enforced in Allegheny County. To this day, the Allegheny County Board of Elections has neither defined nor clarified the meaning of electioneering nor has it indicated that it will enforce the statutory law.

38. The Memorandum, and the press reports describing it, will only serve to create further confusion as to what is electioneering and whether or not it is permitted within polling place in not only Allegheny County, but also in other polling places throughout the Commonwealth.

39. Plaintiffs believe and therefore aver that the confusion caused by the Memorandum means that members of election boards at election districts will be forced to become "fashion police" in trying to decide what articles of apparel or

paraphernalia are acceptable and which are not. Disputes will likely arise within the polling place and this will disrupt the electoral process, compromise the integrity of the election and affect the health and safety of the voters. The disputes within the polling places could very well rise to the level of acrimonious and heated exchanges as often occurs outside the polling place on election day. The courts will likely be inundated on election day with a plethora of suits and claims filed regarding what is and what is not permissible "soft electioneering."

40. If various Boards of Elections do not specifically adopt a resolution stating that the statute bans all forms of electioneering within the polling place (including the wearing of campaign paraphernalia and clothing), disruptions at the polling place as described herein will occur on Election Day and the voters' right of a safe harbor will be denied.

41. The Plaintiffs requested relief is also required since the Memorandum supports permitting the "soft electioneering" and hence if various county Boards of Election, adopt resolutions to enforce the ban currently in the statute, they face the prospect of challenges from those such as the ACLU that support the soft electioneering, as the Memorandum gives improper comfort and support to such challenges.

42. Our statute, designed to protect the voter, fails, if it is not uniformly interpreted and enforced in such situations. Someone of differing viewpoints or who perhaps is older, frail, or uncertain, could be dissuaded from voting with their heart or even become uncomfortable or afraid to enter into the polling area and the voting

booth. Plaintiffs believe, and therefore aver, that they have received conflicting instructions on these issues directly from the County Board of Elections further compounding the confusion. All of this puts the voter at risk. Furthermore, it is a violation of the statute, which guarantees the voter the right to a safe harbor within the polling area to exercise one of our most cherished Constitutional rights, the right to freely vote for our government's leaders. In the last moments before casting their ballot, voters should be given the opportunity to make final decisions without any electioneering influence. Our legislature and state Constitution, guarantee that right.

43. Pennsylvania polling places generally include a Judge of Elections, as well as majority and minority inspectors, a machine inspector, poll watchers and voters waiting to vote. Election work by definition is not a full time or career position, but rather a concerned citizen, working a long and tiring day (usually starting before 7:00 am until after 8:00 pm). Additionally, and noteworthy to consider, not all polling places are fully staffed, due to shortages in personnel and the sheer magnitude of coordinating so many workers (some volunteer, others low paid) on a single day.

44. Election workers may not be familiar with the law or the nuance between a statute and a seemingly authoritative letter from the Department of State. Additionally, election workers could be swayed by newspaper articles or snippets on the evening news on this issue.

45. Such ambiguity causes chaos and uncertainty, which could then lead to a slippery slope of outright abuse and partisan shenanigans that election workers simply are not equipped to handle, however well-intentioned. In fact, to burden our election workers with such vague and conflicting direction as to their role, is a disservice to their good intentions and could dissuade participation in future elections.

46. Our duly elected legislature did not leave the practice of electioneering up to the whim and caprice of election officials across the Commonwealth. Therefore, an unelected official from the Department of State should not be allowed to essentially change our law with a few keystrokes.

47. To prevent further harm, the Department of State must immediately issue a second memorandum, rescinding the "opinion" on passive electioneering as outlined in the September 8, 2008 document.

**COUNT I – DECLARATORY JUDGMENT AS TO CHET HARHUT, INDIVIDUALLY AND IN HIS CAPACITY AS COMMISSIONER, BUREAU OF COMMISSIONS, ELECTIONS AND LEGISLATION, PENNSYLVANIA DEPARTMENT OF STATE; PENNSYLVANIA DEPARTMENT OF STATE; PEDRO A. CORTES, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA**

48. Plaintiffs incorporate the allegations of Paragraphs 1 through 47 of this Complaint by reference as though fully set forth herein.

49. The Department of State issued an erroneous and misleading opinion Memorandum to County Boards of Elections.

50. The Department of State incorporated correspondence from the Pennsylvania ACLU in the Memorandum, thus adopting and disseminating a private entity's doctrine as if it was the settled law of this Commonwealth.

51. An actual, immediate and justiciable controversy exists between plaintiffs and the Pennsylvania Department of State concerning the definition of the term "electioneering."

52. Plaintiffs are in need of the Court's assistance in resolving the parties' differing interpretations of the statute.

WHEREFORE, plaintiffs respectfully request that this Court issue declarations as follows:

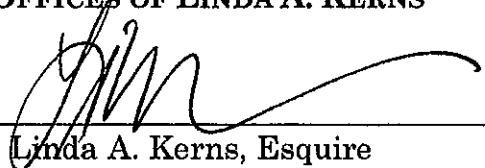
- A. Chet Harhut, Individually and in his capacity as Commissioner, Bureau of Commissions, Elections and Legislation, and the Pennsylvania Department of State and Pedro Cortes shall immediately rescind and make null and void the September 8, 2008 Memorandum on the subject of Passive Electioneering and communicate this to all parties who received the Memorandum and the clarification e-mail;
- B. The Pennsylvania Department of State shall be prohibited from disseminating unauthorized and legally erroneous opinions regarding the Pennsylvania Election Code.
- C. County Boards of Elections shall immediately notify all Judges of Elections and district election board members that they must enforce the Pennsylvania



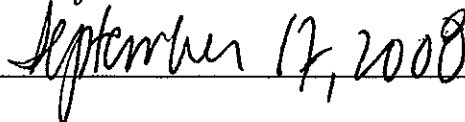
Election Code, specifically Section 3060(c): "No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act;" which means no "soft electioneering in polling places."

**LAW OFFICES OF LINDA A. KERNS**

BY: \_\_\_\_\_

  
Linda A. Kerns, Esquire  
Attorney for Plaintiffs

DATE: \_\_\_\_\_



**LINDA A. KERNS, ESQUIRE**  
*Attorney ID No. 84495*  
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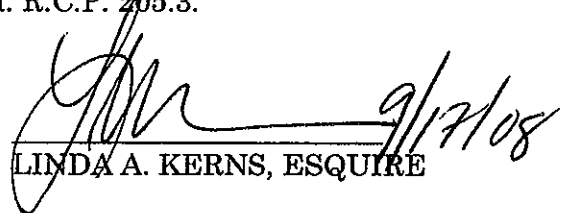
Attorney for Plaintiffs

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

<b>Richard Kraft &amp;</b>	:	<b>ELECTION LAW</b>
<b>John Dickinson</b>	:	<b>MATTER</b>
	:	
<b>Plaintiffs</b>	:	<b>NO.</b>
	:	
<b>v.</b>	:	
	:	
<b>Chet Harhut, Individually and in</b>	:	
<b>his capacity as Commissioner, Bureau of</b>	:	
<b>Commissions, Elections and Legislation,</b>	:	
<b>Pennsylvania Department of State;</b>	:	
<b>Pennsylvania Department of State;</b>	:	
<b>Pedro A. Cortes, Individually and in</b>	:	
<b>his capacity as Secretary of the</b>	:	
<b>Commonwealth of Pennsylvania</b>	:	
	:	
<b>Defendants</b>	:	
	:	

**CERTIFICATE OF ATTORNEY**

I, Linda A. Kerns, attorney for the plaintiffs in this matter, hereby certify that the original pleading in this matter was properly signed and verified by each plaintiff, and the verifications attached to the within pleading are true and correct facsimile copies of their signatures and if any other party requires the filing of the original signature I will file same pursuant to Pa. R.C.P. 205.3.

  
LINDA A. KERNS, ESQUIRE

**LINDA A. KERNS, ESQUIRE**

*Attorney ID No. 84495*

Attorney for Plaintiffs

**LAW OFFICES OF LINDA A. KERNS**

1500 Market Street, 12<sup>th</sup> Floor, East Tower

Philadelphia, PA 19102

Tele: 215-246-3425/Fax: 215-701-4154

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**Richard Kraft &  
John Dickinson**

**Plaintiffs**

**v.**

**Chet Harhut, Individually and in  
his capacity as Commissioner, Bureau of  
Commissions, Elections and Legislation,  
Pennsylvania Department of State;  
Pennsylvania Department of State;  
Pedro A. Cortes, Individually and in  
his capacity as Secretary of the  
Commonwealth of Pennsylvania**

**Defendants**

**ELECTION LAW  
MATTER**

**NO.**

**CERTIFICATE OF SERVICE**

I, Linda A. Kerns, do hereby certify that I caused to be served on September 18, 2008, true and correct copies of Richard Kraft's and John Dickinson's Complaint for Declaratory Judgment, via overnight mail service and/or hand delivery, upon the following:

Pennsylvania Department of State  
305 North Office Building, Harrisburg, Pennsylvania, 17120.

Pedro Cortez  
Secretary of the Commonwealth  
305 North Office Building, Harrisburg, Pennsylvania, 17120

Chet Harhut  
Deputy Commissioner Bureau of Commissions, Elections and Legislation  
305 North Office Building, Harrisburg, Pennsylvania, 17120

  
LINDA A. KERNS, ESQUIRE

**LINDA A. KERNS, ESQUIRE**  
*Attorney ID No. 84495*  
**LAW OFFICES OF LINDA A. KERNS**  
1500 Market Street, 12<sup>th</sup> Floor, East Tower  
Philadelphia, PA 19102  
Tele: 215-246-8425/Fax: 215-701-4154

*Attorney for Plaintiffs*

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**Chet Harhut, Individually and in  
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Pennsylvania Department of State;  
Pedro A. Cortes, Individually and in  
his capacity as Secretary of the  
Commonwealth of Pennsylvania**

**Defendants.**

**ELECTION LAW  
MATTER**

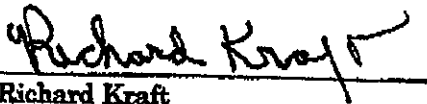
**NO.**

**VERIFICATION**

Richard Kraft hereby states that he is the Plaintiff in the captioned action; that he is authorized to take this verification and that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and belief.

The undersigned understands that the statements made therein are subject to the penalties of 18 Pa. C.S. §4904 for unsworn falsification to authorities.

Date: September 17, 2008

  
Richard Kraft

**LINDA A. KERNS, ESQUIRE**  
*Attorney ID No. 84495*  
**LAW OFFICES OF LINDA A. KERNS**  
1500 Market Street, 12<sup>th</sup> Floor, East Tower  
Philadelphia, PA 19102  
Tele: 215-246-3425/Fax: 215-701-4154

Attorney for Plaintiffs

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**Richard Kraft &  
John Dickinson**

**Plaintiffs**

v.

**Chet Harhut, Individually and in  
his capacity as Commissioner, Bureau of  
Commissions, Elections and Legislation,  
Pennsylvania Department of State;  
Pennsylvania Department of State;  
Pedro A. Cortes, Individually and in  
his capacity as Secretary of the  
Commonwealth of Pennsylvania**

**Defendants**

**ELECTION LAW  
MATTEE;**

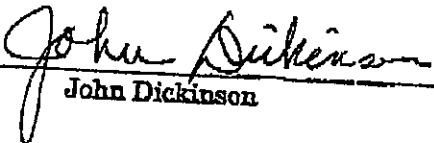
**NO.**

**VERIFICATION**

John Dickinson hereby states that he is the Plaintiff in the captioned action; that he is authorized to take this verification and that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and belief.

The undersigned understands that the statements made therein are subject to the penalties of 18 Pa. C.S. §4904 for unsworn falsification to authorities.

Date: September 17, 2008

  
\_\_\_\_\_  
John Dickinson

# **Exhibit 1**

**Commonwealth of Pennsylvania**  
**Department of State**  
**September 8, 2008**

**TO:** County Boards of Election

**FROM:** Chet Harhut, Commissioner

**SUBJECT:** Passive Electioneering

At the annual Pennsylvania County Election Officials Conference held in Erie recently, the Department discussed with many of you its thoughts on the subject of "passive electioneering," which can include wearing tee shirts, clothing or buttons with a candidate's or political party's name, picture or emblem. On Primary Election Day, April 25, 2008, we received calls from voters as well as counties regarding this important issue. Our advice then and now remains the same. ~~We believe that~~ if such electioneering remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute "electioneering" as that term is used in section 1220(c) of the Pennsylvania Election Code, 25 P.S. § 3060(c).

You should be aware that on August 19, 2008, the Secretary of the Commonwealth received the enclosed letter from the American Civil Liberties Union of Pennsylvania (ACLU) and the League of Women Voters of Pennsylvania asking us to provide an opinion clarifying this issue. The authors of the letter believe that this issue "implicates First Amendment free-speech rights" and urges us to adopt a narrow definition of the term "electioneer." The letter also lists examples where the ACLU and the League have received complaints from voters regarding this subject.

As we discussed at the conference, the term "electioneer" is not defined in the Pennsylvania Election Code. Furthermore, section 302(f) of the Election Code, 25 P.S. § 2642(f), provides that the county boards of elections (not the Department of State) shall "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and elections." 25 P.S. § 2642(f). Furthermore, section 302(g) provides that the county boards of elections shall "instruct election officers in their duties . . . to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

Finally, the General Assembly has determined in section 1105-A of the Election Code that the Department of State may issue binding directives for the county boards of elections on only one subject: "the implementation of electronic voting procedures and for the operation of electronic voting systems." 25 P.S. § 3031.5(a). This issue relating to apparel in the polling place would not fall within the scope of electronic voting procedures or the operation of electronic voting systems. As such, the various suggestions and recommendations that we make

to the counties regarding this and other issues, must be reviewed and considered by the county boards of elections in conjunction with their solicitors. Therefore, we ask that those of you receiving this memo confer with your solicitor and commissioners regarding this issue

Of primary concern is that no duly registered person be turned away at the polls. If the conduct and apparel of a voter is determined to be more than passive, it should be addressed by the district election officials. We understand that many district election officials distribute jackets, sweaters, sweatshirts or other garments so that voters may cover up the clothing while they are in the process of voting. Again, care should be taken to allow individuals to vote. Furthermore, we know that many of you are now or soon will be educating your district election officials (poll workers) regarding matters such as this so that the decision that you make will be implemented uniformly and without discrimination throughout your county.

Finally, as some of you have asked, we believe that there is an important distinction between individual voters who wear clothing or political buttons and those who are watchers at the polling places in your county. Because watchers may be present throughout the day at the precincts and because voters cannot necessarily distinguish between watchers and district election officials, we believe it is reasonable for county boards of elections to prohibit watchers from wearing any clothing or political buttons that show or advocate the election of a candidate or candidates of a specific political party.

If you, your solicitor, or your commissioners would like to discuss this issue with the Department, we suggest that you contact Deputy Chief Counsel Larry Boyle at (717) 783-1657.

Enclosure

C: Harry VanSickle, Deputy Secretary



# **Exhibit 2**



RECEIVED  
2008 AUG 19 AM 9:35  
DEPT OF STATE  
OFFICE OF  
THE SECRETARY

August 14, 2008

Eastern Region Office  
PO Box 40008  
Philadelphia, PA 19106  
215.592.1513 T  
215.592.1343 F

Central Region Office  
PO Box 11761  
Harrisburg, PA 17108  
717.238.2258 T  
717.236.6895 F

Western Region Office  
313 Atwood Street  
Pittsburgh, PA 15213  
412.681.7736 T  
412.681.8707 F

Pedro A. Cortés,  
Secretary of the Commonwealth  
210 N. Office Building  
Harrisburg, PA 17120

Re: Request to clarify meaning of 25 Pa. Cons. Stat. Ann. §  
3060(c), which prohibits electioneering within polling place

Dear Secretary Cortés,

We are writing to ask you to provide an opinion clarifying that the definition of "electioneer," as used in the Pennsylvania Election Code, 25 Pa. Cons. Stat. Ann. § 3060(c), does not apply to and/or prohibit voters from casting ballots while wearing partisan T-shirts, stickers, and buttons. "Electioneer," a term that is not defined by the election code or Pennsylvania case law, has been interpreted inconsistently by poll workers and has led to confusion about what voters may wear into polling places when they cast their ballots. We respectfully request that you provide an opinion to the county boards of elections clarifying the meaning of "electioneer" as that term is used in § 3060(c). And because the statute implicates First Amendment free-speech rights, we urge you to adopt a narrow definition of the term "electioneer" that would explicitly allow voters to wear candidate t-shirts, buttons, stickers, and similar items into the polling place in order to cast their votes.

We received complaints from people in Mt. Lebanon, Pa., and in Ardmore, Pa., who were prohibited from voting in the April 22, 2008, primary because they wore t-shirts endorsing candidates for office into the polling place.<sup>1</sup> And we have learned that the website for the Centre County Board of Elections informs voters that they will be asked to remove "any campaign material that is

---

<sup>1</sup> The complainants were permitted to vote if they agreed to remove their t-shirts or turn them inside out. We have received similar complaints in recent elections from elsewhere in Allegheny County, as well as Lancaster and York Counties.

exposed (hat, shirt, button, etc.)” before voting.<sup>2</sup> But practice varies from one polling place to another. Identical t-shirts and other forms of “passive” electioneering, such as candidate stickers and buttons, were permitted during the primary election in other Allegheny County polling places, for example.

25 Pa. Cons. Stat. Ann. § 3060(c) states that “[n]o person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act.” Only poll watchers, voters in the course of voting and those providing assistance to them, election officers, clerks, machine inspectors, overseers, and peace and police officers are allowed within ten feet of the polling place. *Id.* at § 3060(d). Accordingly, the statute’s prohibition of electioneering within the polling place applies only to voters and those persons necessary to facilitate and oversee the voting process. Although the state can constitutionally prohibit the latter category of persons from wearing items endorsing candidates for office while performing their election-day duties, when that restriction is applied to voters themselves — who must go to the polling place to exercise their right to vote — it implicates important First Amendment rights.

Because of the First Amendment interests involved, county boards of elections and individual poll workers should not be permitted to decide for themselves whether voters who wear candidate t-shirts, buttons, and stickers to the polls are engaged in electioneering. According such broad discretion to poll workers has the potential to result in unconstitutional viewpoint discrimination,<sup>3</sup> and voters’ First Amendment rights should not depend on which county they happen to live in. There is obvious confusion about what acts constitute electioneering under the statute and a concurrent need on the part of county boards of elections and poll workers for guidance on this issue.

That guidance should define the term “electioneer” narrowly. When First Amendment freedoms are at issue, “government may regulate only with narrow specificity.”<sup>4</sup> Simply wearing a t-shirt, sticker, or button endorsing a candidate is not “electioneering” within the plain meaning of the word, which is defined by Merriam-Webster as “to take an active part in an election; specifically: to work for the election of a candidate or party.” Any decision to depart from the plain

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<sup>2</sup> Elections and Voter Registration, Centre County Board of Elections, available at <http://www.co.centre.pa.us/elections/elect.asp>.

<sup>3</sup> *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-131 (1992) (“A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority.”) (internal quotations and citations omitted).

<sup>4</sup> *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963).

meaning of the word and include passive acts like wearing a candidate t-shirt, sticker, or button in the statute's prohibitions must be made by the legislature.

For all of these reasons, we request that you provide a written opinion to the county boards of elections by September 2, 2008, clarifying that *voters* who are present in the polling place to cast their ballots are permitted to wear t-shirts, stickers, and buttons endorsing candidates for office. We also ask that you provide us with a copy of that opinion. Please contact us at (412) 681-7864 if you have any questions about this request.

Sincerely,



Sara J. Rose, Staff Attorney  
Witold J. Walczak, Legal Director  
ACLU of Pennsylvania

Andrea Mulrine, President  
League of Women Voters of Pennsylvania

# **Exhibit 3**

Posted on Tue, Sep. 9, 2008

## Voters can wear campaign buttons to polls, Pa. says

HARRISBURG - Voters who show up at the polls wearing campaign buttons or T-shirts should be allowed to cast ballots, the Pennsylvania Department of State has told county elections officials.

> State Elections Commissioner Chet Harhut said that, as long as a voter does not try to campaign in the polling place, his or her attire should not matter. Harhut's position was outlined in a memo sent out last week. "Of primary concern is that no duly registered person be turned away at the polls," Harhut said. "If the conduct and apparel of a voter is determined to be more than passive, it should be addressed by the district election officials."

> The Pennsylvania chapter of the American Civil Liberties Union had sought clarification about the issue because of voter complaints in recent elections from Allegheny, Lancaster, Montgomery and York Counties.

> Harhut said it is reasonable for counties to prohibit poll watchers from wearing clothing or buttons that "show or advocate the election of a candidate or candidates of a specific political party." - AP

>

**Find this article at:**

[http://www.philly.com/philly/news/pennsylvania/20080909\\_Voters\\_can\\_wear\\_campaign\\_buttons\\_to\\_polls\\_Pa\\_says.html?adString=ph.news/pennsylvania;category=pennsylvania;&randomOrd=091408015557](http://www.philly.com/philly/news/pennsylvania/20080909_Voters_can_wear_campaign_buttons_to_polls_Pa_says.html?adString=ph.news/pennsylvania;category=pennsylvania;&randomOrd=091408015557)

Check the box to include the list of links referenced in the article.

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# **Exhibit 4**

## Linda A Kerns

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**From:** Tabas, Lawrence [Lawrence.Tabas@obermayer.com]  
**Sent:** Sunday, September 14, 2008 8:49 PM  
**To:** Linda A Kerns  
**Subject:** FW: Electioneering

-----Original Message-----

**From:** Boyle, Larry [mailto:LLBOYLE@state.pa.us]  
**Sent:** Wednesday, September 10, 2008 8:51 AM  
**To:** Tabas, Lawrence  
**Subject:** Electioneering

Lawrence,

Here is an email that we sent out to the counties today regarding this issue. The email below is similar to the discussions I have had with county election directors and solicitors who have called me. In fairness to other counties that have not called me, we thought it best to send this to all the counties.

Thank you for calling Al today to discuss this issue further.

Sincerely,

Louis Lawrence Boyle  
Deputy Chief Counsel  
Pennsylvania Department of State  
210 North Office Building  
Harrisburg, PA 17120  
Phone: 717.783.1657 I Fax: 717.214.9899  
llboyle@state.pa.us  
www.dos.state.pa.us

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-----Original Message-----

**From:** Harhut, Chet  
**Sent:** Tuesday, September 09, 2008 5:13 PM  
**To:** Adams - Dutko, Monica; Allegheny - Wolosik, Mark; Armstrong - Buzard, Wendy J.; Beaver - Mandity, Dorene; Bedford - Koenig, Margaret A.; Berks - Olivieri, Deborah; Blair - Burns, Linda; Blair - Crowl, Shirley; Bradford - Smithkors, Renee; Bradford - Zbyszinski, Marie; Bucks - Dean, Deena K.; Butler - Young, Regis L.; Cambria - Smith, Fred R.; Cameron - Munz, Brenda; Carbon - Leffler, Kenneth J.; Centre - McKinley, Joyce; Chester - Forsythe, Jim; Clarion - Kuzmovich, Ronn; Clarion - Moore, Sally; Clearfield - Bumbarger, Donna; Clearfield - Clark, Linda; Clinton - Bame, Constance; Clinton - Conrad, Kathy; Columbia - Reichart, Joanne K.; Crawford - Mushrush, Melanie; Cumberland - Brown, Penny; Cumberland - Salzarulo, Bethany; Dauphin - Boyer, Mary Ann; Dauphin - Chiavetta, Steven G.; Delaware - Hagan, Lauren; Delaware - Headley, Mary Jo; Elk - Frey, Kim; Erie - Drayer, Sharon A.; Fayette - Lint, Laurie A.; Forest - Hitchcock, Jean Ann; Franklin - Aines, Jennie M.; Franklin - Aines, Jennie M.; Franklin - Hart, John A.; Fulton - Wible, Richard L.; Greene - Pratt, Frances; Huntingdon - McNeal, Sandra; Indiana - Maryai, Robin; Indiana-Streams, Debra; Jefferson - Crumlish, Thomas; Jefferson - Lupone, Karen; Juniata - Stong, Eva M.; Lackawanna - Medalis, Marion; Lackawanna - Young, Maryann Spellman; Lancaster - Ernst, Carole; Lancaster - Skilling, Diane; Lancaster - Stehman, Mary Z.; Lawrence - Gabriel, Marlene D.; Lebanon - Yingst, Nick; Lehigh - Sterner, Stacy; Luzerne -



Piazza, Leonard C., III; Lycoming - Adams, Sandra P.; McKean - Widiway, Judy; Mercer - Greenburg, Jeff; Mifflin - Laub, Nancy K.; Monroe - Bryan, LaShawn; Monroe - May-Silfee, Sara; Montgomery - Allen Patricia; Montgomery - Passarella, Joseph; Montour - Brandon, Holly A.; Montour - Dyer, Darlis; Montour - Woodruff, Theresa; Northampton - Rumsey, Debi; Northampton- Howey Erney; Northumberland - Deitrick, Samuel S.; Northumberland - Thew, Mary; Perry - Delancey, Bonnie L.; Perry Co. Voter Registration; Philadelphia - Lee, Bob; Philadelphia - Rubin, Bill ; Pike - Orben, Gary R.; Pike -Goldsack, Yalanda; Potter - Lewis, Sandra; Schuylkill - Dries, Elizabeth J.; Schuylkill - Wiscount, Dave; Snyder - Dauberman, Michelle L.; Snyder - Heintzelman, Veda M.; Snyder - Nace, Patricia; Somerset - Pritts, Tina; Sullivan - Panichi, Joyce; Susquehanna - Watts, Laura; Tioga - Coxe, George F., Jr.; Union - Radel, Glenda; Union - Robinson, Diana; Union - Sheesley, Cindy; Union - Showers, John R.; Union - Zerbe, Kim; Venango - Jones, Denise M.; Venango - Saltarelli, Sue; Warren - Matve, Pamela; Warren - Snavley, Monica; Warren - Zuck, Lisa; Washington - Spahr, Larry; Wayne - Furman, Cindy; Westmoreland - Lechman, Beth; Westmoreland - Montini, James; Wyoming - Ball, Florence; Wyoming - Crispell, Marisa; York - Suchanic, Nikki  
Subject: Electionerring  
Importance: High

Dear County Election Officials,

Since we have sent you the memo from the Department and the letter we received from the ACLU, we have heard from a number of counties regarding this issue. If you have not already done so, you should show both our memo of September 4 and the ACLU letter of August 14 to your solicitor and discuss with your solicitor the case of *Burson v. Freeman*, 504 U.S. 191 (1992), in which the U.S. Supreme Court upheld a TN statute prohibiting the wearing of campaign buttons or clothing within the established boundary of an election precinct. Although the TN law is different from the PA Election Code, this case could be the basis for a county passing a resolution exercising its powers to regulate the polling place conduct and decorum to prohibit the display of campaign clothing or paraphernalia.

Thank You,  
Chet