

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-543-07T1

ON APPEAL FROM FINAL ADMINISTRATIVE ACTION
BY THE OFFICE
OF THE ATTORNEY GENERAL

SAT BELOW:

ANNE MILGRAM, ATTORNEY GENERAL OF NEW JERSEY

IN RE: ATTORNEY GENERAL'S
"DIRECTIVE ON EXIT POLLING:
MEDIA AND NON-PARTISAN PUBLIC
INTEREST GROUPS," ISSUED
JULY 18, 2007

ACLU-NJ, Appellant

Anne Milgram, in her official capacity as Attorney
General of New Jersey, Respondent

NOTICE OF MOTION

FRANK L. CORRADO, ESQUIRE
BARRY, CORRADO, GRASSI & GIBSON, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

EDWARD BAROCAS, ESQUIRE
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
35 Halsey Street
Newark, NJ 07102
(973) 642-2086
Attorneys for Plaintiff-Respondent

TO: LARRY R. ETZWEILER, SDAG

PLEASE TAKE notice that at a time and place to be determined by the Court, Appellant the ACLU-NJ will ask the Court to grant it a preliminary injunction 1) permitting it to distribute voters' rights cards within 100 feet of the polling place during the February 5, 2008, primary election; and 2) to conduct exit polling within 100 feet of the polling place during the February 5 primary without two weeks' notice to, or approval by, county boards of elections.

In support of that motion, the ACLU-NJ will rely on the accompanying brief and the certification of Deborah Jacobs.

BARRY, CORRADO, GRASSI &
GIBSON, PC

DATED: December 27, 2007

By: 

FRANK L. CORRADO, ESQUIRE

ACLU-NJ

By: 

EDWARD BAROCAS, ESQUIRE

IN RE: ATTORNEY GENERAL'S
"DIRECTIVE ON EXIT POLLING:
MEDIA AND NON-PARTISAN PUBLIC
INTEREST GROUPS," ISSUED
JULY 18, 2007

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-543-07T1

ON APPEAL FROM FINAL
ADMINISTRATIVE ACTION BY
THE OFFICE OF THE ATTORNEY
GENERAL

**CERTIFICATION OF DEBORAH
JACOBS**

I, Deborah Jacobs, hereby certify:

1. I am the Executive Director of the American Civil Liberties Union of New Jersey (hereinafter "ACLU-NJ"). I make this certification in support of the ACLU-NJ's motion for preliminary injunction in this matter. I have personal knowledge of the matters set forth herein.

2. The ACLU-NJ is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the United States Constitution. Founded in 1960, the ACLU-NJ has approximately 15,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 400,000 members nationwide. The ACLU-NJ's address is: P.O. Box 32159, Newark, New Jersey 07102.

3. In previous elections, the ACLU-NJ, in conjunction with other public interest organizations, organized volunteers to hand

out voter rights cards on election days to persons entering voting sites. The voter rights cards provide general information and contain no mention of any individual running for office or any public question to be voted upon.

4. The ACLU-NJ, in previous elections, has also organized volunteers to conduct questioning of voters leaving polling sites, regarding the voters' experiences with the polling site and the voting process. Again, there was no mention of any individual running for office or any public question that was voted upon.

5. ACLU-NJ volunteers sought to conduct these activities within 100 feet of polling sites, so as to have access to voters. However, on numerous occasions, ACLU-NJ volunteers were precluded from, and threatened with arrest for, engaging in the activities described above. When our volunteers attempted to conduct their activities outside 100 feet from the polling locations, their access to voters was severely limited.

6. The ACLU-NJ plans to have volunteers hand out voter rights cards to persons entering polling sites and conduct questioning of voters exiting polling sites during the primary election on February 5, 2008. It has recently hired an individual specifically to organize volunteers and to conduct such activities during that election.

7. As in past elections, the ACLU-NJ's proposed activities would not interfere with, obstruct or seek to influence any voters.

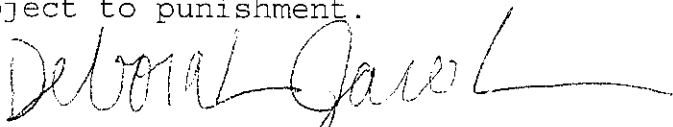
Its polling would be limited to exiting voters. Its distribution

of voters' rights cards would not involve any solicitation of voters; volunteers would simply offer the cards to voters as they entered or exited the polls.

8. The effort to secure volunteers will continue up until the day of the election. Therefore, we will be unable to know prior to February 5, 2008, exactly how many volunteers we will have, how many polling places we will cover, which polling places we will cover (as that may depend on where the volunteers reside), and the names of the volunteers covering particular sites.

9. The ACLU-NJ also fields phone calls from voters during election days, and will do so during the February 5, 2008, primary election. If we receive complaints from a particular polling site, we may deem it appropriate to move volunteers from one location to the polling site about which complaints were received, so that we may hand out voter rights cards to the voters entering that polling place. As such, we may seek to hand out voter rights cards at a polling place where we did not, prior to February 8, 2008, intend to conduct activities.

10. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are false, I may be subject to punishment.


DEBORAH JACOBS

Dated: December 26, 2007

**IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

DOCKET NO. A-543-07T1 .

ON APPEAL FROM FINAL ADMINISTRATIVE ACTION
BY THE OFFICE
OF THE ATTORNEY GENERAL

SAT BELOW:

ANNE MILGRAM, ATTORNEY GENERAL OF NEW JERSEY

IN RE: ATTORNEY GENERAL'S
"DIRECTIVE ON EXIT POLLING:
MEDIA AND NON-PARTISAN PUBLIC
INTEREST GROUPS," ISSUED
JULY 18, 2007

ACLU-NJ, Appellant

Anne Milgram, in her official capacity as Attorney
General of New Jersey, Respondent .

**BRIEF AND APPENDIX OF THE AMERICAN CIVIL
LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF
MOTION FOR A PRELIMINARY INJUNCTION**

FRANK L. CORRADO, ESQUIRE
BARRY, CORRADO, GRASSI & GIBSON, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

EDWARD BAROCAS, ESQUIRE
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
35 Halsey Street
Newark, NJ 07102
(973) 642-2086
Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

TABLE OF CONTENTS OF APPENDIX vi

I. PROCEDURAL HISTORY 1

II. STATEMENT OF THE FACTS 3

III. ARGUMENT 6

 A. The ACLU Is Likely To Succeed On Both Its
 Statutory and Its Constitutional Challenges To
 The Validity Of the Attorney General's Directive. 7

 1. The Attorney General's Directive, As
 Clarified, Conflicts With The Intent Of The
 Statutes It Purports To Implement, And Is
 Therefore Invalid. 8

 2. Even If Statutorily Authorized, The
 Directive's Prohibition On the Distribution
 of Voters' Rights Cards Violates The First
 Amendment. 14

 3. The Directive's Notice And Approval
 Requirements Constitute An Improper Prior
 Restraint. 21

 B. The Injury to the ACLU's Expressive Rights
 Constitutes Imminent Irreparable Harm. 26

 C. The Balance Of Equities Clearly Favors The ACLU
 In This Matter. 28

IV. CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Alexander v. United States, 509 U.S. 544 (1993) 22

<u>American Broadcasting Co. v. Blackwell</u> , 479 F. Supp. 2d 719 (S.D. Ohio 2006)	21
<u>Anderson v. Spear</u> , 356 F.3d 651 (6th Cir. 2004)	20
<u>Arizona Right to Life PAC v. Bayless</u> , 320 F.3d 1002 (9th Cir. 2003)	26
<u>Ashcroft v. ACLU</u> , 542 U.S. 656 (2004)	20
<u>Beal v. Stern</u> , 184 F.3d 117 (2d Cir. 1999)	28
<u>Burson v. Freeman</u> , 504 U.S. 191 (1992)	passim
<u>Cantwell v. Connecticut</u> , 310 U.S. 296 (1940)	23
<u>Caput Mortuum, LLC v. S&S Crown Services, Ltd.</u> , 366 N.J. Super 323 (App. Div. 2004)	10
<u>Carey v. Brown</u> , 447 U.S. 455 (1980)	18
<u>Carroll v. Comm'rs of Princess Anne</u> , 393 U.S. 175 (1968)	24
<u>Citizens' Coach Co. v. Camden Horse R.R. Co.</u> , 29 N.J. Eq. 299 (E. & A. 1878)	26
<u>City of Cincinnati v. Discovery Network, Inc.</u> , 507 U.S. 410 (1993)	18
<u>Coleman v. Wilson</u> , 123 N.J. Super. 310 (Ch. Div. 1973)	27
<u>Community for Creative Non-Violence v. Turner</u> , 714 F. Supp. 29 (D.D.C. 1989)	25
<u>Connick v. Myers</u> , 461 U.S. 138 (1983)	14
<u>Crosswell v. Shenouda</u> , 275 N.J. Super. 614 (Ch. Div. 1994)	11
<u>Crowe v. DiGioia</u> , 90 N.J. 126 (1982)	6
<u>Davis v. N.J. Dept. of Law and Public Safety, Division of State Police</u> , 327 N.J. Super. 59 (Law Div. 1999)	27
<u>Elrod v. Burns</u> , 427 U.S. 347 (1976)	27, 28

<u>Eu v. San Francisco Cty. Dem. Cent. Comm.</u> , 499 U.S. 214 (1989)	17
<u>Forsyth County, Ga. v. Nationalist Movement</u> , 505 U.S. 123 (1992)	22, 23
<u>Frisby v. Shultz</u> , 487 U.S. 474 (1988)	22
<u>FW/PBS, Inc., v. Dallas</u> , 493 U.S. 215 (1990)	22
<u>Gormley v. Lan</u> , 88 N.J. 26 (1981)	8
<u>Grossman v. City of Portland</u> , 33 F.3d 1200 (9th Cir. 1994)	25
<u>Hamilton Amusement Center v. Verniero</u> , 156 N.J. 254 (1998)	26
<u>Heffron v. International Society for Krishna Consciousness, Inc.</u> , 452 U.S. 640 (1981)	23
<u>Hohe v. Casey</u> , 868 F.2d 69 (3d Cir. 1989)	27
<u>In re Civil Commitment of J.P.</u> , 393 N.J. Super. 7 (App. Div. 2007)	11
<u>In re New Jersey Industrial Health Coverage Program's Readoption of N.J.A.C. 11:20-1</u> , 179 N.J. 570 (2004)	8
<u>Isetts v. Borough of Roseland</u> , 364 N.J. Super. 247 (App. Div. 2003)	11
<u>ISKCON v. Lee</u> , 505 U.S. 672 (1992)	13, 15, 17
<u>Lakewood v. Plain Dealer Pub. Co.</u> , 486 U.S. 750 (1988)	23
<u>Mardi Gras of San Luis Obispo v. City of San Luis Obispo</u> , 189 F. Supp. 2d 1018 (C.D. Cal. 2002)	25
<u>McCormack v. Tp. of Clinton</u> , 872 F. Supp. 1320 (D.N.J. 1994)	29
<u>McIntyre v. Ohio Elections Comm'n</u> , 514 U.S. 334 (1995)	14
<u>NAACP v. City of Richmond</u> , 743 F.2d 1346 (9 th Cir. 1984)	24, 25

<u>New Jersey Guild of Hearing Aid Dispensers v. Long</u> , 75 N.J. 544 (1978)	8
<u>New York Times Co. v. United States</u> , 403 U.S. 713 (1971)	22
<u>Niemotko v. Maryland</u> , 340 U.S. 268 (1951)	23
<u>O'Connell v. State</u> , 171 N.J. 484 (2002)	10
<u>Perry Educ. Ass'n. v. Perry Local Educators' Assn.</u> , 460 U.S. 30 (1983)	15
<u>Police Dep't. v. Mosley</u> , 408 U.S. 92 (1972)	15, 16
<u>Princeton Insurance Co. v. 349 Associates, LLC</u> , 147 N.J. 337 (1997)	26
<u>R.A.C. v. P.J.S., Jr.</u> , 192 N.J. 81 (2007)	12
<u>R.H. Macy & Co. v. Director, Div. of Taxation</u> , 77 N.J. Super. 155 (App. Div. 1962), aff'd o.b. 41 N.J. 3 (1963)	8
<u>Regan v. Time, Inc.</u> , 468 U.S. 641 (1984)	15
<u>Rosen v. Port of Portland</u> , 641 F.2d 1243 (9th Cir. 1981)	25
<u>Shuttlesworth v. Birmingham</u> , 394 U.S. 147 (1969)	23, 24
<u>Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.</u> , 502 U.S. 105 (1991)	15, 18
<u>Southeastern Promotions, Ltd. v. Conrad</u> , 420 U.S. 546 (1975)	22, 23
<u>State v. Black</u> , 54 N.J.L. 446 (Sup. 1892), aff'd p.c. 65 N.J.L. 688 (E. & A. 1900)	10
<u>State v. Churchdale Leasing, Inc.</u> , 115 N.J. 83 (1989)	12
<u>State v. McKeon</u> , 385 N.J. Super. 559 (App. Div. 2006)	12
<u>Subcarrier Communications, Inc. v. Day</u> , 299 N.J. Super. 634 (App. Div. 1997)	28
<u>Swartzwelder v. McNeilly</u> , 297 F.3d 228 (3d Cir. 2002)	28

<u>Telco Communications, Inc. v. Barry</u> , 731 F. Supp. 670 (D.N.J. 1990)	29
<u>Texas v. Johnson</u> , 491 U.S. 397 (1989)	17
<u>Thomas v. Collins</u> , 323 U.S. 516 (1945)	23
<u>Trotman v. Bd. of Trustees of Lincoln Univ.</u> , 635 F.2d 216 (3d Cir. 1980)	27
<u>United States v. Grace</u> , 461 U.S. 171 (1983)	14, 28
<u>United States v. Kokinda</u> , 497 U.S. 720 (1990)	13
<u>United States v. O'Brien</u> , 391 U.S. 367 (1968)	20
<u>Vance v. Universal Amusement Co., Inc.</u> , 445 U.S. 308 (1980)	20
<u>Ward v. Rock Against Racism</u> , 491 U.S. 781 (1989)	20, 25, 26
<u>Watchtower Bible and Tract Society of New York v. Village of Stratton</u> , 536 U.S. 150 (2002)	22
<u>Wilentz v. Galvin</u> , 125 N.J.L. 455 (Sup. 1940)	10

Constitutional Provisions

U.S. Const., Amend. 1	1
N.J. Const. (1947) Art. I, ¶6 and ¶18	26
N.J. Const. (1947) Art. V, § 4, ¶6	8

Statutes

N.J.S.A. 19:34-6	9, 12
N.J.S.A. 19:34-7	9, 12
N.J.S.A. 19:34-15	7, 9

Court Rules

R. 2:2-3(a)(2)	1
----------------------	---

Other

American Heritage Dictionary of the English Language
(4th Ed. 2006) 13

TABLE OF CONTENTS OF APPENDIX

Notice of Appeal 1a

Attorney General's Directive July 18, 2007 3a

Letter, Donna Kelly, AAG, to County Boards
of Election July 18, 2007 5a

Letter, Barocas to Kelly, July 27, 20007 8a

Letter, Kelly to Barocas, October 16, 2007 10a

Sample Voters Rights Card 12a

I. PROCEDURAL HISTORY

This is an appeal of final administrative action. R. 2:2-3(a)(2). The ACLU-NJ challenges the validity of a "Directive on Exit Polling" issued in July 2007 by the state attorney general. Aa1.

That directive, as "clarified" by the attorney general's office, permits exit polling by media and non-partisan entities within 100 feet of a polling place, but prohibits all other expressive activity in that 100-foot zone. In addition, the directive requires those entities, at least two weeks before an election, to apply for and obtain clearance to poll from the county election board. Aa3-7.

The ACLU believes the directive 1) exceeds the attorney general's authority under the governing election statutes; 2) violates the First Amendment¹ by imposing a content-based restriction on protected speech; and 3) constitutes an improper prior restraint. This appeal asserts those claims.

The state's primary election will be held February 5, 2008. As it has in past elections, the ACLU wishes to engage in voter protection activities. It wants to distribute "voters' rights cards" to persons entering voting sites. It also wishes to question voters as they leave the polls about their voting

¹ "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const., Amend 1.

experience. It seeks to conduct these activities within 100 feet of the polling place.

The attorney general's directive prohibits the first activity and requires prior state approval for the second. Accordingly, the ACLU asks the Court for a preliminary injunction to permit it to distribute voters' rights cards within 100 feet of the polls and to conduct its "exit polling" without notice and pre-approval.

For the following reasons, the Court should grant this application:

First, the ACLU is likely to succeed on its three theories of invalidity. The election statutes under which this directive purportedly was promulgated do not prohibit all expressive activity within 100 feet of the polling place; they only ban electioneering, solicitation and obstruction of voters. Because the attorney general's directive prohibits all other expressive activity, such as the distribution of voters' rights cards, it is ultra vires.

Even if statutorily authorized, the directive creates content-based restrictions among speakers that either fail to serve a compelling state interest or are not sufficiently tailored to advance that interest. Moreover, the notice and pre-approval requirements for election polling are presumptively

invalid prior restraints, for which the state cannot provide adequate justification.

Second, failure to grant the injunction will cause the ACLU substantial irreparable harm: it will lose its right to engage in constitutionally protected speech in a circumstance where, given the timing, only an injunction will protect that right.

Third, the balance of equities favors the ACLU. Its right to free expression in this context outweighs any claim the state might have that its interests justify a flat ban on pre-vote contact with voters.

II. STATEMENT OF THE FACTS

On July 18, 2007, the attorney general issued the directive that is the subject of this lawsuit. The directive was sent to all county boards of elections and county election superintendents. Aa3.

The directive permitted exit polling by media and non-partisan groups in the 100-foot zone outside a polling place, but prohibited "assist[ing] or offer[ing] materials to voters entering the polling place." Aa4. It also required advance approval for exit polling from the county election board, on two weeks' notice. It contained no standards for the grant or denial of that approval. Aa3.

A letter from Deputy Attorney General Donna Kelly accompanied the directive. The letter made clear that while exit polling (as restricted by the directive) was permitted within 100 feet of the polling place, "'entry' polling, the distribution of materials, or attempts to assist voters within the 100-foot exclusionary zone" were not. Aa5.

On July 27, 2007, ACLU Legal Director Edward Barocas wrote to Kelly for "clarification" of the directive. Barocas asked 1) whether "exit polling" included questions about a person's voting experience; 2) whether "exit polling activity" included distribution of voters' rights cards to exiting voters; and 3) whether expressive activities other than exit polling were permitted within the 100-foot zone if they did not involve "electioneering." Aa8.

Kelly responded on October 16, 2007. She indicated that 1) exit polling included questions about a voters' experience; 2) distribution of materials to exiting voters was not "exit polling activity" (and presumably therefore not permitted); and 3) "activity within the 100-foot protected zone is to be limited to properly credentialed exit pollsters, in furtherance of facilitating access to the polls and to assuring the orderly conduct of elections." Aa10.

The ACLU-NJ is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution and the Bill of Rights. As part of its mission it conducts voter education and protection activities at polling places during elections. See Certification of Deborah Jacobs, Paragraph 2.

In particular, as it has in the past, the ACLU wishes in the future to 1) offer "voters' rights" cards to voters as they enter the polling place; and 2) survey exiting voters about their voting experience, including barriers to voting or discriminatory treatment. Id. at Paragraphs 3-6; Aa12-13.

To ensure the effectiveness of these efforts, the ACLU seeks to conduct them as close to the polling place as possible. Accordingly, while the ACLU does not seek to be in the polling place itself, it does wish to conduct its activities in the 100-foot "non-electioneering" zone around the polling places. Jacobs Certification at Paragraphs 5-6.

The ACLU's proposed activities would not interfere with, obstruct or seek to influence any voters. Consistently with the directive, its polling would be limited to exiting voters. Its distribution of voters' rights cards would not involve any solicitation of voters; volunteers would simply offer the cards

to voters as they entered or exited the polls. Id. at Paragraph 7.

As "clarified," the attorney general's July 18 directive prohibits the ACLU from distributing voters' rights cards to both entering and exiting voters within 100 feet of a polling place. It permits post-vote questioning about a voter's experience, but only if approved by the election board on two weeks notice.

On October 1, 2007, the ACLU-NJ filed this appeal. Aal. Given the pending February 5 primary, and the unlikelihood of this Court's final decision before then, it seeks a preliminary injunction permitting it to distribute voters' rights cards within the 100-foot zone, and to engage in exit polling without the prior approval of the state. Jacobs Certification at Paragraphs 8-9.

III. ARGUMENT

To obtain a preliminary injunction, a litigant must establish 1) a probability of success on the merits, including the absence of factual disputes; 2) immediate, irreparable harm; and 3) a favorable balance of the equities. Crowe v. DiGioia, 90 N.J. 126, 132-34 (1982).

The ACLU has satisfied that standard. It is likely to succeed on both its statutory and constitutional claims that the

directive is invalid. Its inability to engage in expressive activities at the upcoming election constitutes imminent irreparable harm. The relevant equities favor vindicating its free speech rights over any countervailing interest the state may advance.

A. The ACLU Is Likely To Succeed On Both Its Statutory and Its Constitutional Challenges To The Validity Of the Attorney General's Directive.

The ACLU does not object to the general principle that the attorney general has authority, consistent with law, to promulgate directives governing such topics as activity around polling places.

Moreover, it agrees with, and endorses, much of what the Directive on Exit Polling contains - particularly the attorney general's statement that exit polling and voter surveying may occur within the 100-foot "electioneering" buffer zone established by the election code. See N.J.S.A. 19:34-15.

The ACLU objects, however, to those portions of the directive that:

1. Prohibit other non-electioneering expressive activities, such as distribution of voter's rights cards, within 100 feet of the polling place.

2. Require those entities that wish to exit poll to submit to a regime of prior restraint.

These features of the directive - which render it unconstitutional and eviscerate its statutory underpinnings - form the basis of the ACLU's appeal. With respect to each of them, the ACLU's challenge is likely to succeed.

1. The Attorney General's Directive, As Clarified, Conflicts With The Intent Of The Statutes It Purports To Implement, And Is Therefore Invalid.

An administrative agency's actions cannot exceed the authority statutorily delegated by the legislature. In re New Jersey Industrial Health Coverage Program's Readoption of N.J.A.C. 11:20-1, 179 N.J. 570, 579 (2004). See Gormley v. Lan, 88 N.J. 26, 38 (1981); New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562-63 (1978).

In particular, an agency may not contravene statutory intent; it may not "take liberties" with statutory language, "even to subserve a desirable policy not effectuated by the act as written." See R.H. Macy & Co. v. Director, Div. of Taxation, 77 N.J. Super. 155, 173 (App. Div. 1962), aff'd o.b. 41 N.J. 3 (1963). See also N.J. Const. (1947) Art. V, § 4, ¶6 (permitting legislature to override agency action that violates statutory intent).

The attorney general's directive prohibits all expressive activity, except for exit polling, within 100 feet of the entrance to a polling place. It seeks to implement what the

attorney general apparently believes is a desirable policy - creation of a 100-foot zone in which no expressive contact with voters, other than post-vote election polling, may occur.

But the election statutes on which the attorney general relies do not embody such a policy, either explicitly or implicitly. Properly read, they only proscribe activity that influences, obstructs or interferes with voters. To the extent the directive goes farther than that, it is ultra vires.

The directive purports to enforce three statutes: N.J.S.A. 19:34-6, N.J.S.A. 19:34-7, and N.J.S.A. 19:34-15. Although they overlap, each targets a particular election concern. But whether read singly or together, none evinces a legislative intent to prohibit all expressive activity within 100 feet of the polls.

The attorney general's directive principally relies on N.J.S.A. 19:34-15. That statute, entitled "Electioneering within or about polling place," provides:

If 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.

This provision prohibits electioneering - the attempt to induce, by suggestion, solicitation or distribution of literature, "support for any candidate, party or public question" - within 100 feet of the polls. See State v. Black, 54 N.J.L. 446, 452 (Sup. 1892), aff'd p.c. 65 N.J.L. 688 (E. & A. 1900) (predecessor statute); see also Wilentz v. Galvin, 125 N.J.L. 455, 457 (Sup. 1940) (statute preserves "the fair and honest conduct of an election").

By its terms, the statute does not prohibit all expressive activity in the 100-foot zone. Had the legislature intended that result, it would simply have said so, rather than specifying particular forbidden activity. See O'Connell v. State, 171 N.J. 484, 488 (2002) (legislature presumed to mean what it plainly said); Caput Mortuum, LLC v. S&S Crown Services, Ltd., 366 N.J. Super 323, 333 (App. Div. 2004) (same).

Moreover, although the state may argue otherwise, the statute does not forbid "display" or "distribution" of all "printed matter" in the 100-foot zone. Both the structure and the grammar of the provision make clear the ban is limited to "electioneering" literature.

First, the prohibition on display and distribution is associated with the prohibitions on "suggestion" and "soliciting"; its meaning must be gleaned from that association,

and from the context of the section as a whole. In re Civil Commitment of J.P., 393 N.J. Super. 7, 16 (App. Div. 2007) (applying the maxim of statutory construction noscitur a sociis); Isetts v. Borough of Roseland, 364 N.J. Super. 247, 257-58 (App. Div. 2003).

Here, as the title of the statute suggests, all the prohibited activities - distribution, display, suggestion and solicitation - appear in the context of their relationship to electioneering. Their meaning should be limited accordingly.

Second, the grammar and punctuation of the provision support this conclusion. The absence of any comma between the prohibited activities indicates the phrase "for any candidate, party or public question" modifies all of them, not just "soliciting support." See Crosswell v. Shenouda, 275 N.J. Super. 614, 620 (Ch. Div. 1994) (legislature presumed to know rules of grammar).

Third, were the modifying phrase applied only to "soliciting support," the result would be nonsensical. The statute would then not only ban all "display" and "distribution" but all "suggestions" within 100 feet of the polls.

On that crabbed construction, any suggestion on any matter, be it related or unrelated to the election, would be prohibited in or around the polls. A person would violate the statute, for

example, if he "suggested" to a voter that they go out to dinner that evening. The legislature cannot be presumed to have intended that absurd result. State v. McKeon, 385 N.J. Super. 559, 568 (App. Div. 2006).

Section 15 is therefore not authority for a ban on expressive activity that is not "electioneering."

The directive also references N.J.S.A. 19:34-6 and -7.

N.J.S.A. 19:34-6 makes it a third degree crime to

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, spend an inordinate amount of time in the polling booth, or do any electioneering within any polling place or within one hundred feet thereof.

Similarly, N.J.S.A. 19:34-7 makes it a fourth degree crime for a person to "loiter, electioneer, or solicit any voter" within 100 feet of the polling place.

"The plain language of a statute is the best indicator of legislative intent." R.A.C. v. P.J.S., Jr., 192 N.J. 81, 95 (2007); see also State v. Churchdale Leasing, Inc., 115 N.J. 83, 101 (1989) By their plain language, these two statutes apply only to affirmative activity, expressive or otherwise, that "obstructs" or "interferes with" voters or constitutes

"loitering," "solicitation" or "electioneering." Nothing proposed by the ACLU fits into those categories.

In particular, the ACLU does not propose to "solicit" entering voters² - that is, to importune them, to ask them for money or other consideration, or to confront them face-to-face in any fashion. See American Heritage Dictionary of the English Language at 1654 (4th Ed. 2006). The ACLU's proposed offer of voters' rights information - akin to offering a leaflet to a passerby - thus poses none of the dangers of congestion, interference or obstruction that are the targets of Sections 6 and 7.

In terms of their propensity to obstruct or congest, a significant distinction - one, in fact, of constitutional dimension - exists between solicitation and the offering of literature. "[S]olicitation impedes the normal flow of traffic because it requires action by those who would respond. ... Confrontation by [a solicitor] disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." ISKCON v. Lee, 505 U.S. 672, 689 (1992) (O'Connor, J., concurring), citing United States v. Kokinda, 497 U.S. 720, 733-34 (1990).

² Obviously, exit polling can be characterized as a form of "solicitation" - of information - but the directive does not forbid that.

Here, the intent of Sections 6 and 7 is to foreclose situations in which intrusion, obstruction or interference might occur. It is not to prohibit the passive proffer of non-partisan, non-electioneering literature.

In sum, the statutes on which the directive rests do not authorize the attorney general to prohibit the distribution of voters' rights pamphlets or other "non-electioneering" literature within 100 feet of a polling place. To the extent the directive does so, it conflicts with the legislature's intent and is therefore ultra vires.

The Court should therefore hold that the ACLU-NJ is reasonably likely to succeed in its statutory challenge to this aspect of the directive.

2. Even If Statutorily Authorized, The Directive's Prohibition On the Distribution of Voters' Rights Cards Violates The First Amendment.

The ACLU's distribution of voters' rights cards is a form of political speech, on a matter of public concern, that lies at the First Amendment's core. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346-47 (1995); Connick v. Myers, 461 U.S. 138, 147 (1983).³ Moreover, in many instances, this activity

³ "There is no doubt that as a general matter peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment." United States v. Grace, 461 U.S. 171, 176 (1983). "We have long recognized that the right

occurs in public forums, places that "by long tradition or government fiat have been dedicated to assembly and debate." Perry Educ. Ass'n. v. Perry Local Educators' Assn., 460 U.S. 30, 45 (1983).

A state's regulation of protected speech in a public forum presumptively violates the First Amendment if it discriminates among speakers on the basis of content. See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991); Police Dep't. v. Mosley, 408 U.S. 92, 95-96 (1972). "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984).

A content-based regulation is subject to "exacting scrutiny"; it is constitutional only if the state can show it serves compelling state interests in the most narrowly tailored way. Burson v. Freeman, 504 U.S. 191, 198 (1992).

The attorney general's directive is content-based: it allows certain kinds of speech - exit polling and voter surveys - within 100 feet of the polls, but prohibits others, including the distribution of voters' rights cards. Thus, "[w]hether

to distribute flyers and literature lies at the heart of the First Amendment." ISKCON v. Lee, 505 U.S. at 702 (Kennedy, J., concurring).

individuals may exercise their speech rights near polling places depends entirely on whether their speech" falls within the directive's definition of exit polling. Burson, 504 U.S. at 197; see Mosley, 408 U.S. at 95.

Mosley, in fact, closely resembles this case. There Chicago passed an ordinance prohibiting picketing 150 feet from schools, but made an exception for labor picketing. That exception rendered the ordinance impermissibly content-based: "[Government] may not select which issues are worth discussing or debating in public facilities." Id. at 96.

The attorney general's directive operates in the same content-based way. It creates a 100-foot "speech-free zone" around polling places and then makes an exception for exit polling. Like the ordinance in Mosley, the directive discriminates among speakers by content.

Accordingly, to justify this aspect of the directive, the state must establish that it serves a compelling state interest in a narrowly tailored way. For several reasons, it cannot meet that burden.

First, as a general matter, the state cannot defend the directive by asserting an interest in protecting the integrity of the election or protecting voters from improper influence. Although these may be compelling interests, see Burson, 504 U.S.

at 199; Eu v. San Francisco Cty. Dem. Cent. Comm., 499 U.S. 214, 228-29 (1989), they are not implicated here. As noted above, the ACLU does not propose to electioneer or influence voters. Banning its distribution of voters' rights cards does not advance the state's interest in preventing voter influence or election fraud. Cf. Texas v. Johnson, 491 U.S. 397, 407-08 (1989) (flag burning statute does not advance state's interest in preventing breaches of the peace).

Second, the state may also argue a compelling interest in keeping the polling places orderly and free of congestion. But even if one assumes this is a "compelling interest," the directive fails to advance it in a rational way.

This is because it permits exit polling within the 100-foot zone. In terms of creating congestion or disorder at the polls, exit polling and the distribution of voters' rights cards are indistinguishable; if anything, exit polling is more disruptive. See ISKCON v. Lee, supra, 505 U.S. at 689.

Accordingly, the directive's distinction between exit polling and distribution of voters' rights cards "bears no relationship whatsoever to the particular interests that the [state] has asserted. It is therefore an impermissible means of responding to" the state's purportedly legitimate interests. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424

(1993). See also, Simon & Schuster, supra, 502 U.S. at 120 (state's interest in compensating crime victims does not justify distinction between income from crime books and income from other sources); Carey v. Brown, 447 U.S. 455, 465 (1980) (state's interest in residential privacy does not justify distinction between labor and non-labor picketing).

In the explanatory letter that accompanied the directive, the state suggests the difference in effect between pre-vote and post-vote contact justifies the directive's distinction. In other words, the state argues that a blanket ban on all pre-vote contact with voters is appropriate.

There are numerous problems with this argument. First, and most obviously, even if the distinction were valid, it would not justify the directive's ban on distributing voters' rights cards to exiting voters. Second, because pre- and post-vote contacts pose the same risks of disorder and congestion, the state may not justify the distinction on that basis. Discovery Network, supra, 507 U.S. at 424.

Finally, insofar as the distinction rests on the notion that post-vote contact, such as exit polling, poses no danger of election fraud or voter distraction, that notion, even if correct, does not establish that distributing voters' rights cards necessarily threatens the integrity or orderliness of the

election process. Absent such proof, the state cannot establish the ban is "necessary" to protect this interest, and the directive fails strict scrutiny.

The state seems to believe Burson v. Freeman, supra, justifies the directive's distinction between pre- and post-voting activity. But Burson does not govern this case; correctly read, it supports the opposite conclusion.

It is true that Burson upheld the constitutional validity of a content-based Tennessee statute that prohibited solicitation of votes and campaign activity within 100 feet of the polls, and did so under a "strict scrutiny" analysis. But that was because the Tennessee statute was limited to electioneering conduct, for which there was an ample historical record of danger to election integrity. See 505 U.S. at 200-206 (summarizing the history of election fraud and anti-electioneering efforts).

Burson did not endorse a flat ban on all expressive activity within 100 feet of the polls. In fact, the Court in Burson specifically rejected a claim that the statute was underinclusive because it did not include non-electioneering activity, and suggested instead that permitting such activity actually enhances the integrity of the election process:

"[A]llowing members of the general public access to the polling place makes it more

difficult for political machines to buy off all the monitors. But regardless of the need for such additional monitoring, there is ... ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses.

504 U.S. at 207 (emphasis supplied). See Anderson v. Spear, 356 F.3d 651, 659-61 (6th Cir. 2004) (questioning validity of state's interest in prohibiting all protected speech around polls).

In other words, the state cannot simply assert that a categorical distinction between pre-vote and post-vote contact with voters serves a compelling interest. “[I]t must demonstrate that its law is necessary to serve the asserted interest.” Id. at 199 (emphasis supplied); see also Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989); United States v. O’Brien, 391 U.S. 367, 371 (1968).

The state has the burden of demonstrating this “narrow tailoring.” See Ashcroft v. ACLU, 542 U.S. 656, 665 (2004); Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 317 (1980). Here it simply cannot do so. The directive’s ban on distribution of voters’ rights cards to entering voters therefore cannot survive strict scrutiny.

To put it another way, creating a "pre-vote speech-free bubble" around the polls is not the least restrictive means of advancing any of the state's legitimate interests. Electioneering bans can protect the integrity of the voting process and prevent improper voter influence. Enforcement of anti-obstruction and anti-interference laws can prevent congestion, facilitate free access to the polls and ensure an orderly election process. See American Broadcasting Co. v. Blackwell, 479 F. Supp. 2d 719, 740 (S.D. Ohio 2006) (existing statutes adequately address congestion problem).

A ban on distribution of voters' rights cards (and other non-obstructive or non-persuasive activity) is therefore not required. Accordingly, the Court should hold that the ACLU is likely to succeed on its constitutional challenge to this aspect of the directive.

3. The Directive's Notice And Approval Requirements Constitute An Improper Prior Restraint.

The directive suffers from a second, distinct constitutional infirmity: its notice and prior approval provisions for exit polling are an invalid prior restraint. They require prospective exit pollsters to apply for, and obtain, approval from the county board of elections before conducting exit polling.

Such a system, requiring "[government permission] before authorizing public speaking, parades or assemblies, 'in the archetype of a traditional public forum,' Frisby v. Shultz, 487 U.S. 474, 480 (1988), is a prior restraint on speech." Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992).

A "heavy presumption" exists against the validity of prior restraints. FW/PBS, Inc., v. Dallas, 493 U.S. 215, 225 (1990). The government "carries a heavy burden of showing justification for the[ir] imposition." New York Times Co. v. United States, 403 U.S. 713, 714 (1971); see also Alexander v. United States, 509 U.S. 544, 554 n.2 (1993).

The basis for this presumption is "a distinction deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

Requiring a citizen or a group to obtain the government's "permission" to speak in public is constitutionally offensive, "not only to the values protected by the First Amendment, but to the very notion of a free society." Watchtower Bible and Tract Society of New York v. Village of Stratton, 536 U.S. 150, 166-7 (2002). "As a matter of principle, a requirement of registration in order to make a public speech would seem

generally incompatible with an exercise of the rights of free speech and free assembly." Thomas v. Collins, 323 U.S. 516, 539 (1945).

Accordingly, as applied to exit polling, the directive is constitutional only if it does not delegate overly broad discretion to a government official, See Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 756-7 (1988).

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." Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981). 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." Shuttlesworth v. Birmingham, 394 U.S. at 150-151; see also Niemotko v. Maryland, 340 U.S. 268, 271 (1951). The reasoning is simple: If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. [at] 553.

Forsyth County, 505 U.S. at 131-2 (citations in original).

The directive fails to satisfy these criteria. It delegates unfettered discretion to the boards of elections to

approve or disapprove exit polling. No standards, objective or otherwise, govern that decision.

Given that there may arise situations when the state - by virtue of content-neutral time, place, and manner, restrictions - may have to limit or regulate access to a polling place, the absence of objective standards is particularly worrisome, since it creates precisely the sort of opportunity for arbitrary decision-making that the heavy presumption against prior restraints was intended to prohibit.

Moreover, the directive's requirement of two weeks' advance notice is also constitutionally defective, because it impermissibly burdens the right to "spontaneous" protected speech.

That right has constitutional dimension. "Timing is of the essence in politics. ... When an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969). "A delay of even a day or two may be intolerable when applied to political speech." NAACP v. City of Richmond, 743 F.2d 1346, 1356 (9th Cir. 1984), citing Carroll v. Comm'rs of Princess Anne, 393 U.S. 175 (1968).

As does the approval requirement, the two-week advance notice requirement restricts far "more speech than is necessary"

to serve any interest the state might have in ensuring the orderly conduct of elections. Ward v. Rock Against Racism, 491 U.S. at 800.

Both empirically and logically, the state does not need 14 days to prepare for the "problems" posed by proposed exit polling. Comparison with notice requirements for "demonstration permits" makes this clear. See Richmond, 743 F.2d at 1357 (striking down 20-day notice requirement for expressive events); Rosen v. Port of Portland, 641 F.2d 1243, 1248 n.8 (9th Cir. 1981) (striking down 24-hour notice requirement for small groups).

The court in Richmond surveyed both practices of other cities and existing precedent, and found 1) that the "mean advance notice period" for expressive events even among major cities like New York, Boston and San Francisco was 36 hours; and 2) that "the only advance notice requirements to be upheld by the courts have been dramatically shorter than 20 days." Id. at 1357 (citing cases).

Subsequent decisions are consistent. See, e.g., Grossman v. City of Portland, 33 F.3d 1200, 1206 (9th Cir. 1994); Mardi Gras of San Luis Obispo v. City of San Luis Obispo, 189 F. Supp. 2d 1018 (C.D. Cal. 2002); Community for Creative Non-Violence v. Turner, 714 F. Supp. 29, 33 (D.D.C. 1989). See also Arizona

Right to Life PAC v. Bayless, 320 F.3d 1002, 1008-09 (9th Cir. 2003) (striking down 24-hour advance notice requirement on distribution of "last-minute" political advertising).

The state's need for a long "lead-time" to prepare for exit polling is even weaker than that for the larger, more spontaneous, expressive events at issue in these cases. Elections occur on predictable dates; the state will have an historical record, can accurately anticipate the amount of exit polling that might occur, and can plan accordingly. Two weeks' advance notice is simply not "necessary" to protect the state's interests. See Ward, supra.

Accordingly, for these reasons as well, the Court should hold that the ACLU is likely to succeed on the merits of its claim.⁴

B. The Injury to the ACLU's Expressive Rights Constitutes Imminent Irreparable Harm.

Irreparable harm is harm that money damages cannot compensate. See Princeton Insurance Co. v. 349 Associates, LLC, 147 N.J. 337, 340 (1997); Citizens' Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303-04 (E. & A. 1878). In particular,

⁴ For the reasons set forth in sections A(2) and A(3) of the argument, the directive also violates the free speech guarantees of the state constitution, which are at least as protective of expression as is the First Amendment. Hamilton Amusement Center v. Verniero, 156 N.J. 254, 264 (1998); N.J. Const. (1947) Art. I, ¶6 and ¶18.

irreparable harm occurs when a defendant's actions threaten destruction or impairment of the subject matter of the litigation. Coleman v. Wilson, 123 N.J. Super. 310 (Ch. Div. 1973).

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). The attorney general's directive palpably chills the ACLU's speech; it deprives it of the opportunity to offer "Know Your Rights" cards to voters before they enter the voting booth, and it conditions appellant's right to conduct exit polling on submission to an improper regime of prior restraint.

The directive thus constitutes the sort of "specific, present objective harm" to the ACLU's First Amendment rights that the Court must deem irreparable. Davis v. N.J. Dept. of Law and Public Safety, Division of State Police, 327 N.J. Super. 59, 69 (Law Div. 1999), citing Trotman v. Bd. of Trustees of Lincoln Univ., 635 F.2d 216, 226 (3d Cir. 1980); see Hohe v. Casey, 868 F.2d 69, 72-73 (3d Cir. 1989).

That harm is both imminent and substantial. The primary election is February 5; the Court will not finally resolve this matter before then. Absent preliminary injunctive relief, the

ACLU will be unable to exercise its expressive rights in a timely or meaningful way.

As noted above, the ACLU's proposed activity lies close to the core of the First Amendment. United States v. Grace, 461 U.S. at 176. By definition then, restriction on that speech is "substantial." See Elrod v. Burns, *supra*.

Accordingly, by establishing a likelihood of success on its First Amendment claim, the ACLU has necessarily demonstrated irreparable harm. Swartzwelder v. McNeilly, 297 F.3d 228, 241-42 (3d Cir. 2002). See also Beal v. Stern, 184 F.3d 117, 123 (2d Cir. 1999).

Furthermore, even without reliance on the First Amendment, money damages cannot compensate the ACLU if the attorney general's directive prohibits it from engaging in expressive activity that the legislature has not prohibited. See Point A(1) above. Accordingly, in the context of its statutory claim as well, the directive causes the ACLU substantial, imminent irreparable harm.

C. The Balance Of Equities Clearly Favors The ACLU In This Matter.

An applicant for restraints must also show that the injury to him outweighs the harm to the other party if the restraints issue. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1997). Here that balance favors the ACLU.

As noted above, the state can articulate no interest served by the directive that justifies its restrictive effect on the ACLU's proposed election activity. It follows that the harm the directive does to the ACLU's First Amendment rights outweighs any harm that might occur if the ACLU is permitted to exercise those rights. See McCormack v. Tp. of Clinton, 872 F. Supp. 1320, 1328 (D.N.J. 1994); Telco Communications, Inc. v. Barry, 731 F. Supp. 670, 684 (D.N.J. 1990).

IV. CONCLUSION

For the foregoing reasons, the Court should grant the ACLU-NJ's motion for a preliminary injunction. It should permit the ACLU-NJ to distribute voters' rights cards to entering and exiting voters within 100 feet of the polling place. And it should permit exit polling without two weeks' notice to, and approval by, county boards of elections.

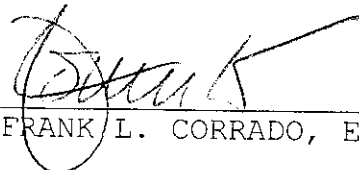
DATED:

Respectfully submitted,

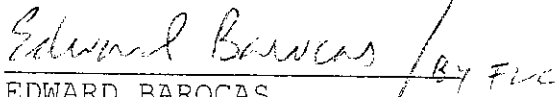
BARRY, CORRADO, GRASSI & GIBSON, P.C.

12/27/07

By:


FRANK L. CORRADO, ESQUIRE

AMERICAN CIVIL LIBERTIES UNION
OF NJ FOUNDATION


EDWARD BAROCAS
ATTORNEYS FOR PLAINTIFFS

APPENDIX

NOTICE OF APPEAL

PLEASE PRINT OR TYPE

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

TITLE IN FULL (AS CAPTIONED BELOW):

ATTORNEY OR PRO SE LITIGANT

In Re: Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups" Issued July 18, 2007

NAME ACLU-NJ (Edward Barocas, Esq.)
ADDRESS P.O. Box 32159, Newark, NJ 07102
TELEPHONE NO. 973-642-2086
ATTORNEY FOR Appellants

ON APPEAL FROM:

[AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, Appellant. ANNE MILGRAM, in her official capacity as as Attorney General of New Jersey, Respondent.]

Division of Taxation final agency decision
TRIAL COURT OR STATE AGENCY
OFFICE OF THE ATTORNEY GENERAL
TRIAL COURT OR AGENCY NUMBER

TRIAL COURT JUDGE

CIVIL [x] CRIMINAL [] JUVENILE []

NOTICE IS HEREBY GIVEN THAT APPEALS TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FROM THE JUDGMENT [] ORDER [] STATE AGENCY DECISION [x] ENTERED IN THIS ACTION ON July 18, 2007 DATE

IF NOT APPEALING THE ENTIRE JUDGMENT, ORDER OR AGENCY DECISION, SPECIFY WHAT PARTS OR PARAGRAPHS ARE BEING APPEALED.

HAVE ALL ISSUES AS TO ALL PARTIES BEEN DISPOSED OF IN THIS ACTION IN THE TRIAL COURT OR AGENCY? (IN CONSOLIDATED ACTIONS, ALL ISSUES AS TO ALL PARTIES IN ALL ACTIONS MUST HAVE BEEN DISPOSED OF.) YES [x] NO []

IF NOT, HAS THE ORDER BEEN CERTIFIED AS FINAL PURSUANT TO R. 4:42-2? YES [] NO []

IN CRIMINAL, QUASI-CRIMINAL AND JUVENILE ACTIONS:

GIVE A CONCISE STATEMENT OF THE OFFENSE AND OF THE JUDGMENT, DATE ENTERED AND ANY SENTENCE OR DISPOSITION IMPOSED.

IS DEFENDANT INCARCERATED? YES [] NO []

WAS BAIL GRANTED OR THE SENTENCE OR DISPOSITION STAYED? YES [] NO []

IF IN CUSTODY, GIVE THE PLACE OF CONFINEMENT.

ATTACH ADDITIONAL SHEETS IF NECESSARY

NOTICE OF APPEAL AND ANNEXED CASE INFORMATION STATEMENT HAVE BEEN SERVED ON:

	<u>NAME</u>	<u>DATE OF SERVICE</u>
TRIAL COURT, JUDGE		
TRIAL COURT CLERK OR STATE AGENCY	Office of the Attorney Genral	10/1/07
ATTORNEY GENERAL OR ATTORNEY FOR OTHER GOVERNMENTAL BODY PURSUANT TO <u>R.</u> 2:5-1(a), (e) or (h)	See below	
OTHER PARTIES:		
<u>NAME AND DESIGNATION</u>	<u>ATTORNEY NAME, ADDRESS AND TELEPHONE NO.</u>	<u>DATE OF SERVICE</u>
Donna Kelly Assistant Attorney General	R.J. Hughes Justice Complex PO Box 112, Trenton, New Jersey 08625 (609) 599-6877, fax: (609) 777-0848	10/1/07

ANNEXED TRANSCRIPT REQUEST FORM HAS BEEN SERVED ON:

	<u>NAME</u>	<u>DATE OF SERVICE</u>	<u>AMOUNT OF DEPOSIT</u>
COURT REPORTER'S SUPERVISOR, CLERK OF COURT OR AGENCY			
COURT REPORTER			

EXEMPT FROM ANNEXING THE TRANSCRIPT REQUEST FORM DUE TO THE FOLLOWING:

- NO VERBATIM RECORD.
- TRANSCRIPT IN POSSESSION OF ATTORNEY OR PRO SE LITIGANT. (FOUR COPIES, ALONG WITH THE COMPUTER DISKETTE FROM THE TRANSCRIPT PREPARER, MUST BE SUBMITTED.) LIST THE DATE(S) OF THE TRIAL OR HEARING.
- MOTION FOR ABBREVIATION OF TRANSCRIPT FILED WITH THE COURT OR AGENCY BELOW.
- MOTION FOR FREE TRANSCRIPT FILED WITH THE COURT BELOW.

I CERTIFY THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF. I ALSO CERTIFY THAT, UNLESS EXEMPT, THE FILING FEE REQUIRED BY N.J.S.A. 22A:2 HAS BEEN PAID.

October 1, 2007

DATE

SIGNATURE OF ATTORNEY OR PRO SE LITIGANT



State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO Box 080
TRENTON NJ 08625-0080

JON S. CORZINE
Governor

ANNE MILGRAM
Attorney General

July 18, 2007

County Boards of Election
County Superintendents of Elections

**Directive on Exit Polling:
Media and Non-Partisan Public Interest Groups**

In my dual capacity as the State's Chief Law Enforcement Officer and Chief Election Official, you are hereby directed to permit exit polling activity by representatives of the media and non-partisan public interest groups on election days.

The following guidelines apply to all exit polling activity within 100 feet of the outside entrance to a polling place:

1. At least two weeks before an election, a representative of a media outlet or a non-partisan public interest group must submit a letter to the applicable county board of election, identifying polling place locations where the exit polling is to be conducted.
2. The county board of election must provide an authorization letter for exit polling to the media and/or non-partisan interest group. This letter is to include the procedures that are set forth in this directive.
3. Any person conducting an exit poll must display credentials, provided by the applicable county board of election, that identify his or her name and the organization that is conducting the exit polling.
4. At all times, exit polling must be conducted in a way that does not obstruct any voter or other authorized individual who is entering or leaving the polling place.

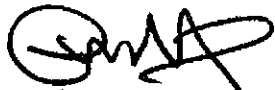
Sent via regular mail



July 18, 2007

Page 2

5. Exit polling must be conducted only when a voter is exiting the polling place, and the voter's participation is strictly voluntary.
6. Exit polling can be conducted within the 100 foot zone from the outside entrance to the polling place.
7. Exit polling cannot be conducted inside the polling place, including the passageway to the polling room and the room itself.
8. There can be no electioneering on behalf of any candidate, political party or group, or referendum within the 100 foot zone.
9. No campaign paraphernalia, signs or other insignia can be displayed by any person conducting an exit poll within the 100 foot zone.
10. Any person conducting an exit poll within the 100 foot zone must comply with any directive from an election official or authorized representative to assure the orderly conduct of the election.
11. Persons conducting an exit poll cannot poll, assist, or offer materials to voters entering the polling place.



ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY



JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

ANNE MILGRAM
Attorney General

ROBERT J. GILSON
Director

July 18, 2007

County Boards of Election
County Superintendents and Deputy Superintendents of Elections

Re: Exit Polling

Dear Election Officials:

This letter represents the Attorney General's determination regarding exit polling within 100 feet of the outside entrance to a polling place and supersedes any prior guidance offered by this office. For the following reasons, your offices are advised that exit polling may be conducted by credentialed representatives of the media and non-partisan interest groups within the 100-foot exclusionary zone. The prohibition on electioneering within this area remains in effect. Nor shall any "entry" polling, the distribution of materials, or attempts to assist voters within the 100-foot exclusionary zone be permitted.

The Attorney General's Office first sanctioned exit polling by the media in a letter opinion dated June 2, 1988 (the "1988 Opinion"). Prior to the issuance of that opinion, exit polling was disallowed on the premise that it was electioneering. Pursuant to several provisions of Title 19, Election Laws of New Jersey, N.J.S.A. 19:34-6, 7 and 15, no electioneering can be conducted within the polling place or room, or within 100 feet from the outside entrance to a polling place. In 1988, however, the Ninth Circuit Court of Appeals, in the matter of Daily Herald Co. v. Munro, 838 F. 2d 380 (9th Cir. 1988), held that exit polling by the media is an activity protected by the First and Fourteenth Amendments of the United States Constitution. In response, the Attorney General's Office issued the 1988 letter opining that exit polling by the media was permissible and did not constitute electioneering. This practice has continued to the current time.

Prior to the November 2006 General Election, non-partisan interest groups requested permission to exit poll and to offer assistance to voters, including by pamphleteering, within the 100 foot exclusionary zone. In a letter dated August 31, 2006, this Office indicated that it was inclined



to permit non-partisan public interest groups to conduct exit polling and to distribute voters' rights pamphlets to voters entering or exiting the polling place. This letter generated comment from a wide range of interests, including election officials and public interest groups. As a result, it was determined that further deliberation was required.

It is undisputed that the State has a compelling interest in securing the right to vote freely and effectively. See, e.g., Burson v. Freeman, 504 U.S. 191 (1992) (affirming a state's right to prohibit electioneering within a designated area of a polling place). Title 19 clearly delineates restrictions that are intended to protect voters' rights and the sanctity of the voting process. N.J.S.A. 19:34-6 provides that no person shall "obstruct or interfere with the entrance to any polling place, or obstruct or interfere with any voters, or loiter, or do any electioneering within any polling place or within one hundred feet thereof". Similarly, N.J.S.A. 19:34-7 prohibits electioneering and loitering as well as the solicitation of voters. Finally, N.J.S.A. 19:34-15 defines prohibited activities to include a ban on the distribution of any "circular or printed matter" or the offering of "any suggestion or solicit any support for any candidate, party or public question" within the above-prescribed 100-foot zone. Because of the importance of free access to the polls, the Legislature made the violation of these statutes a crime.

The State's compelling interest in protecting the electoral process does not justify a per se prohibition of exit polling. As the Ninth Circuit Court of Appeals recognized in Daily Herald, supra, exit polling involves freedom of speech and as such is protected under the First and Fourteenth Amendments of the United States Constitution. Because voters are approached after casting a ballot, exit polling does not necessarily interfere with free access to the polling place. See, e.g., CBS Broadcasting, Inc. v. Cobb, N. 06-22463, 9 (S.D. Fla. October 24, 2006) (holding that prohibiting exit polling within a 100-foot "no solicitation" zone was unconstitutional because the State "failed to provide any meaningful evidence that exit polling has any history of leading to voter intimidation, impeding voter access to the polls, or encouraging election fraud").

Although the 1988 Opinion concerned a request by the media to exit poll, we do not see a reason to distinguish between media and non-partisan interest group exit polling, provided that such polling is conducted in a manner that does not obstruct the entrance to a polling place or interfere with voters entering or leaving the polls.

There is, however, a distinction between approaching voters as they are entering a polling place and approaching voters as they are exiting the polling place. Approaching a voter before he or she enters the polling place, whether it be to offer assistance, distribute pamphlets, or ask questions, may hinder free access to the polling place and intimidate voters. As the United States Supreme Court stated in Burson, a state has the right to decide that "the[] last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice." 504 U.S. at 210. The provisions of Title 19, as set forth above, evince an intent by the New Jersey Legislature to permit voters to enter a polling place without interference, obstruction, or intimidation. The fundamental right to cast a ballot in an

July 18, 2007

Page 3

election free from the taint of intimidation and fraud [Burson, 504 U.S. at 211] underscores the State's prohibition against approaching voters, who are on their way to cast a ballot, within 100 feet of the polling place.

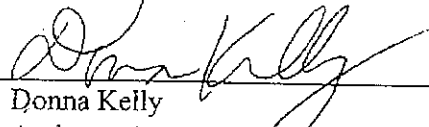
Finally, while exit polling is permissible, it must be conducted in a non-obstructive manner. Attached hereto is the Attorney General directive that sets forth the specific parameters of exit polling and procedures that need to be followed to assure the orderly conduct of the election. These directives are to be effective commencing with the November 2007 General Election.

Kindly contact this office if you have any questions.

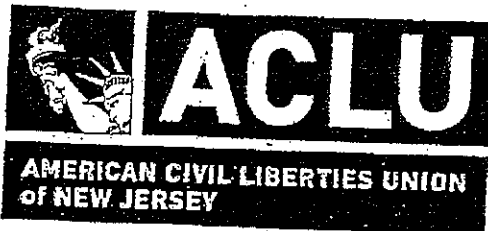
Sincerely yours,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: _____


Donna Kelly
Assistant Attorney General

DK/ac



FOUNDATION

P.O. Box 32159
Newark, NJ 07102

Tel: 973 642 2086
Fax: 973 642 6523

info@aclu-nj.org
www.adu-nj.org

ELLEN SAMUEL
President
DEBORAH JACOBS
Executive Director
EDWARD BAROCAS
Legal Director
THOMAS S. HARRIS
Development Director

July 27, 2007

Donna Kelly, AAG
Office of the Attorney General
Department of Law and Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0112

Dear Assistant Attorney General Kelly,

During my meeting on Wednesday, July 25, 2007, with Attorney General Anne Milgram, I requested certain clarifications to the "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups" issued on July 18, 2007. She suggested that I send all requests for clarification to your attention. Given that these questions were raised in numerous prior correspondences with the Office of the Attorney General, I anticipate a prompt response.

1. How is "exit polling" defined? This is important because numerous groups do not poll regarding how voters voted but, rather, ask questions related to voters' experiences at the polls and what barriers to voting might have been encountered.
2. How is "all exit polling activity" defined? For example, please confirm that persons who have been authorized by the county board of elections to conduct exit polling have the right to offer materials (for example, but not limited to, providing Know-Your-Rights pamphlets) to voters as they exit the voting site. Paragraph 11 of the Directive only prohibits persons conducting an exit poll from offering materials to voters *entering* the polling place.
3. The Directive does not address the rights of individuals or organizations who engage in neither exit polling nor electioneering, such as a peace organization handing out leaflets about an upcoming peace vigil or a parent-teacher association handing out information about an upcoming bake sale. Are those organizations permitted to engage in free speech activities within 100 feet of polling sites? If so, is such activity also limited to contact with voters exiting, rather than entering, the polling sites? Whether the answers to these questions are in the affirmative or negative, will there be a forthcoming official directive delineating the Attorney General's position on the rights of those individuals or organizations?

I thank you for your attention to these questions and for your anticipated prompt reply.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Ed Barocas', written in black ink.

Ed Barocas
Legal Director



JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

ANNE MILGRAM
Attorney General

ROBERT J. GILSON
Director

October 16, 2007

Edward Barocas, Esq.
ACLU
P.O.Box 32159
Newark, New Jersey 07102

Re: Exit Polling

Dear Mr. Barocas:

This is in response to your letter of July 27, 2007, wherein you pose several questions relating to the Attorney General's July 18, 2007 opinion regarding exit polling. As you know, the issue of exit polling was first addressed by this office in a June 2, 1988 letter, which opined that exit polling by credentialed media was not to be considered electioneering, and therefore, could be conducted within the 100 foot protected zone outside of the entrance to the polling place.

The July 18, 2007 opinion concluded that such exit polling activity could also be conducted by nonpartisan interest groups. In response to your first inquiry, the July 18 opinion should not be construed as limiting a properly credentialed pollster to inquiring as to how a voter voted. Questioning voters regarding his or her voting experience, and whether any problems were encountered in exercising the right to vote, would be a legitimate part of exit polling. No exit polling can be conducted, however, in a manner that obstructs or hinders the ease of ingress and egress for the voters. As for your second inquiry, we are of the view that the distribution of materials, such as "Know-Your-Rights" pamphlets, would not be encompassed within "exit polling activity."

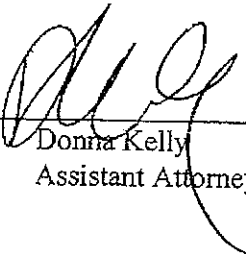
Regarding your third inquiry, activity within the 100-foot protected zone is to be limited to properly credentialed exit pollsters, in furtherance of facilitating access to the polls and to assuring the orderly conduct of elections.



October 16, 2007
Page 2

If you have any further questions on this matter, kindly contact this office.

Sincerely yours,
ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By:  _____
Donna Kelly
Assistant Attorney General

c: DAG Karen DuMars
DAG Jason Orlando
County Boards of Election
County Superintendents of Elections

The ACLU-NJ & the LWVNJ 2006 Voter Protection Project

- ★ Your vote is important.
- ★ The ACLU-NJ and the LWVNJ are dedicated to ensuring that your vote is counted.
- ★ If you have or see a registration or voting problem, call the LWVNJ VOTEline at 1-800-792-VOTE (8683).
- ★ Trained volunteers from LWVNJ and ACLU-NJ will answer your voting questions and provide assistance.
- ★ Legal volunteers will be available to provide assistance to voters calling the VOTEline.
- ★ In addition to helping individual callers, the ACLU-NJ and LWVNJ will use information from the VOTEline to help assess the operation of our state election systems.

For more information on voting and elections, visit www.lwvnj.org or www.aclu-nj.org.



Voter Protection Hotline 2006

Questions or problems with voter registration or voting?

CALL TOLL-FREE IN NEW JERSEY:
★ **1-800-792-VOTE** ★
for immediate assistance

**MAKE SURE YOUR VOTE IS COUNTED
NOVEMBER 7**

SPONSORED BY:
**LEAGUE OF WOMEN VOTERS
OF NEW JERSEY
AND
ACLU-NJ**

NEW JERSEY VOTERS' BILL OF RIGHTS

You have the right to vote if:

- ✓ you registered to vote at least 21 days before the election.
- ✓ you are at your polling place at any time between 6 am and 8 pm on November 7.
- ✓ you have completed a criminal sentence, and are no longer on parole or probation, and you have registered to vote.

You have the right:

- ✓ to vote without anyone trying to influence your vote.
- ✓ to bring your children into the voting booth with you.
- ✓ to file a signed or anonymous written complaint at your polling place if you are dissatisfied with the way an election is being run.
- ✓ to bring someone of your choice into the voting booth to assist you with voting if you cannot read or write English, or have a physical disability, or to request special assistance from the pollworker.
- ✓ to vote under your original name if you have changed your name since registering to vote.

Not allowed to vote at your polling place?

You have the right to vote by Provisional Ballot if:

- ✓ your name is NOT on the poll list of voters but you believe you are registered to vote.
- ✓ you have moved recently within your county or to another county, and have not registered at your new address.
- ✓ you are a first-time voter and you did not provide the accepted form of identification when you registered to vote, or if that information could not be verified.
- ✓ you requested an absentee ballot but didn't receive it in time for the election.

After the election, you have the right to know if your

provisional ballot was counted and if not, the reason. The pollworker must provide you with contact information. Call toll-free 1-877-NUNOTER (1-877-658-6837) 10 days after the election to find out if your provisional ballot was counted.

If your right to vote is challenged by an election official, and

you are prevented from voting, you have the right to a hearing ON ELECTION DAY to determine your eligibility. If the judge finds that you should be allowed to vote, you have the right to vote that same day.

You have the right to bring this Bill of Rights with you into the voting booth.

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-543-07T1

ON APPEAL FROM FINAL ADMINISTRATIVE ACTION
BY THE OFFICE
OF THE ATTORNEY GENERAL

SAT BELOW:

ANNE MILGRAM, ATTORNEY GENERAL OF NEW JERSEY

IN RE: ATTORNEY GENERAL'S
"DIRECTIVE ON EXIT POLLING:
MEDIA AND NON-PARTISAN PUBLIC
INTEREST GROUPS," ISSUED
JULY 18, 2007

ACLU-NJ, Appellant

Anne Milgram, in her official capacity as Attorney
General of New Jersey, Respondent

CERTIFICATION OF SERVICE

FRANK L. CORRADO, ESQUIRE
BARRY, CORRADO, GRASSI & GIBSON, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

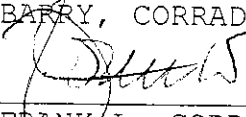
EDWARD BAROCAS, ESQUIRE
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
35 Halsey Street
Newark, NJ 07102
(973) 642-2086
Attorneys for Plaintiff-Respondent

I, FRANK L. CORRADO, hereby certify this 27TH day of December, 2007, that a copy of the foregoing Notice of Motion, Brief and Certification were served by regular mail, postage prepaid, on:

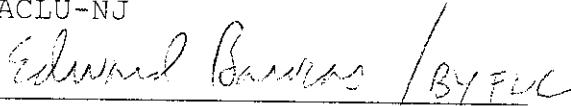
LARRY R. ETZWEILER, ESQUIRE
Office of Attorney General
Richard J. Hughes Justice Complex
CN 116
Trenton, NJ 08625

DATED: 12/27/07

BARRY, CORRADO, GRASSI & GIBSON, PC


FRANK L. CORRADO, ESQUIRE
Attorney for Appellant

ACLU-NJ

 BY FUC
EDWARD BAROCAS, ESQUIRE