

THE RUTHERFORD INSTITUTE

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INTERNATIONAL OFFICE
CENTRAL AND EASTERN EUROPE
Budapest, Hungary

October 16, 2008

Jean Cunningham, Chairman
Virginia State Board of Elections
Suite 101, North 9th Street
Richmond, Virginia 23219-3485

Re: Polling Place Restrictions on Freedom of Speech and Expression

Dear Ms. Cunningham:

Thomas Jefferson understood that the first duty of government is to protect the freedom of expression. "The will of the people is the only legitimate foundation of any government," Jefferson declared, "and to protect its free expression should be our first object."

Regrettably, the State Board of Elections shirked this important civic duty on October 14, 2008, when it adopted Policy 2008-007 expressly prohibiting voters from showing, displaying or exhibiting "any material, object, item, advertisement, or piece of apparel, which has the purpose of expressly advocating the election or defeat of a clearly identified candidate."¹

By singling out political expression for censorship, the SBE has pitted itself against the ideals of free expression embodied in the United States and Virginia Constitutions. Indeed, this newly adopted policy is an imminent threat to the fundamental right to freedom of expression of the Commonwealth's citizens.

The courts have recognized that states may regulate speech in and around polling places in order (1) to protect the right of persons to vote freely for the candidate of their choice, and (2) to protect against fraud and preserve the integrity of the voting process. To this end, Section 24.2-604 of the Code of Virginia was intended to prohibit electioneering or political solicitation within 40 feet of a polling place. However, this statutory attempt to protect voters from political harassment is a far cry from doing away with free speech altogether, especially the kind of passive political expression exhibited on apparel, buttons or other paraphernalia that is now being targeted for censorship by the SBE.

¹ "State Board of Elections Policy 2008-007,"
http://www.sbe.virginia.gov/cms/documents/Election_Laws/SBE_Policy-2008-007_-_Definition_of_Exhibit_Other_Campaign_Materials.pdf.

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Furthermore, the policy's language is overly vague, which could very well result in local officials across the state gagging free speech and/or disenfranchising Virginia voters. As the *Newport News Daily Press* concludes, the policy will "leave local election officials to make the call on what's admissible—in effect, setting ad hoc parameters around freedom of speech. What passes at one precinct might get you disenfranchised at another."² And as the ACLU of Virginia has rightly pointed out, this will inevitably "lead to confusion at the polls, and may even result in some individuals being denied the right to vote."³

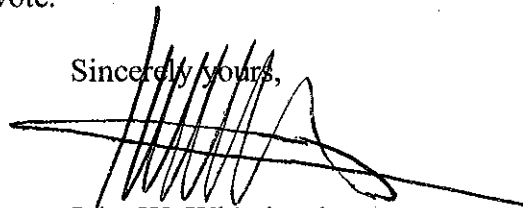
Political speech is essential to and is the essence of self-government. It is for this reason that the protections afforded to expression under the law have the fullest and most urgent application to speech that relates to politics. In no way does passive political speech as expressed on clothing, buttons, stickers or other paraphernalia threaten the order of polling places or the freedom of other voters to cast their ballots according to their conscience. In fact, restrictions on unobtrusive political messages serve only to squelch constitutionally protected expression without furthering any legitimate interests of the Commonwealth.

The Rutherford Institute has already been contacted by numerous individuals who are concerned that if they choose to exercise their constitutionally protected rights of freedom of speech and expression, they will be denied the right to vote.

If you will not stand for the people of this Commonwealth, we will.

I expect a response to this letter on or before Monday, October 20, 2008. Should you fail to respond by that date or act to rescind Policy 2008-007, we will be forced to consider other options, legal or otherwise, in order to protect the right of the people to freely exercise their freedom of expression as well as their right to vote.

Sincerely yours,



John W. Whitehead
President

cc: The Honorable Tim Kaine
Harold Pyon, SBE Vice-Chair
Nancy Rodrigues, SBE Secretary

² "Gag Order," *Daily Press* (October 16, 2008), http://www.dailypress.com/news/opinion/dp-ed_voters_edit_1016oct16,0,5399528.story.

³ "ACLU Asks State Board of Elections to Allow Political Messages on Apparel in Polling Places," ACLU of Virginia (October 10, 2008), <http://www.acluva.org/newsreleases2008/Oct10sbe.html#letter>.