

# The State of Texas



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John B. Scott  
Secretary of State


## **ELECTION ADVISORY** **NO. 2022-31**

**TO:** All Election Officials

**FROM:** Keith Ingram, Director of Elections

**DATE:** October 14, 2022

**RE:** Certain Activities in Vicinity of Polling Places



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As you prepare for the November 8, 2022 election, we wish to advise you of state law on several early voting and election day polling place issues.

### **Use of Firearms by Law Enforcement**

Please note that Section 46.03(a) of the Texas Penal Code generally prohibits a person from bringing a firearm onto the premises of a polling place. However, this prohibition does not apply to a peace officer, regardless of whether the police officer is on or off duty. For this and other potentially applicable exceptions, see TEX. PEN. CODE § 46.15. **The legislation allowing open carry of handguns, does NOT change the law as it pertains to guns in the polling place; thus no one except licensed peace officers may carry handguns into the polling place.**

Although there is no requirement that you place any sort of signage in the polling place in order to inform voters of the unchanged restrictions regarding handguns in the polling place, if you wish to provide a notice to that effect, you may post form AW-7-9a, Notice of Prohibition of Handguns in the Polling Place. Alternatively, if you wish to submit your own proposed notice to our office for approval, you may do so by emailing the form to us at [elections@sos.texas.gov](mailto:elections@sos.texas.gov). Any such notice must be in English and Spanish, as well as any other languages required in your political subdivision.

For more information regarding OAG opinion KP-0212 and the situations upon which a presiding judge may carry a handgun in the polling place, please see Advisory 2018-29.

### **Electioneering**

Each early voting and election day polling place must be organized with 100-foot distance markers posted at surrounding outside entrances to the building. Please note that the early voting clerk and the presiding judge of each polling place, as appropriate, have the

authority of a district judge while serving in that capacity. This authority enables the early voting clerk or the presiding judge, as appropriate, to use his or her discretion to ensure the safety and efficiency of the early voting and election day polling place and the surrounding 100-foot area. TEX. ELEC. CODE §§ 32.075, 81.002.

While an election judge or early voting clerk has the authority to ensure that electioneering is not occurring within the distance set by the 100-foot marker, Section 32.075(e) of the Code specifically states that a presiding judge may not enforce electioneering provisions outside of the 100-foot distance markers. The same prohibition applies to an early voting clerk, per Section 81.002 of the Code.

A violation of Section 61.003 or 85.036 of the Election Code is a Class C misdemeanor. TEX. ELEC. CODE §§ 61.003, 85.036.

### **Sound Amplification Devices**

It is also prohibited to use a sound amplification device to electioneer within 1,000 feet of the early voting or election day polling place; per Section 61.004 of the Code, a violation of this provision is a Class C misdemeanor. The same prohibition applies to an early voting clerk, per Section 81.002, Election Code. Although the enforcement authority is limited to the 100-foot area, the election judge or early voting clerk may address a violation of this law if the sound is heard within the 100-foot area. As a practical matter, the focus of the election judge and early voting clerk will be on the polling area and surrounding 100-foot area. As such, and as a best practice, the judge may contact law enforcement to enforce the sound amplification device rule.

If you or your presiding judges have questions as to what constitutes electioneering, encourage them to contact either your office or our office directly with specific questions.

### **Electioneering Litigation**

On September 30, 2021, the U.S. District Court for the Southern District of Texas issued a final judgment in *Ostrewich v. Hudspeth, et al.*, a lawsuit challenging the electioneering provisions in Sections 61.003, 61.010, and 85.036 of the Texas Election Code to the extent that such provisions related to voters' apparel during voting. The lawsuit was based on the United States Supreme Court case of *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

Based on the district court's ruling, **a person may not wear apparel or a similar communicative device relating to a candidate, measure, or political party appearing on the ballot in the current election under Section 61.010, but a person may wear such apparel relating to a candidate, measure, or political party that does not appear on the ballot in the current election.**

### **Regulating Electioneering Outside 100-Foot Marker**

An entity that owns or controls a public building being used as a polling place may not prohibit electioneering outside of the 100-foot distance marker. However, the entity may

enact reasonable regulations in regards to the time, place, and manner of electioneering. TEX. ELEC. CODE § 61.003(a-1).

Only a court of law can determine what is reasonable in terms of time, place, and manner. However, an example of a reasonable regulation may include prohibiting electioneering on sidewalks or driveways to keep them clear for pedestrians and traffic. Finally, we recommend that all regulations be content neutral. If you have questions, we suggest that you contact your attorney.

### **Curbside Voting and Electioneering**

If a voter is physically unable to enter the polling place without personal assistance or likelihood of injuring the voter's health, an election officer shall deliver a ballot or voting machine to the voter at the polling place entrance or curb on the voter's request. This process is commonly referred to as "curbside voting." TEX. ELEC. CODE § 64.009. When individuals vote curbside, their car becomes their voting station. Curbside voters must be afforded the opportunity to vote their ballot privately (in the same way as a voter in the voting booth) and thus are entitled to vote without the interference of campaigns or bystanders. Per Section 32.075 of the Election Code, the presiding judge has the authority to preserve order and prevent breaches of peace if there are individuals harassing voters while they vote curbside.

### **County Chairs in Polling Places**

The Election Code provides that a county chair may be in a polling place during the **primary or primary runoff** election. TEX. ELEC. CODE § 172.1113. Note that the provision does not provide that a county chair may be in the polling place during other elections. However, a county chair may enter the polling place for other authorized reasons (e.g., as a voter, assistant, poll watcher).

### **Cell Phones and Other Wireless Communication Devices**

Persons are not allowed to use wireless communications devices within 100 feet of the voting stations. Additionally, persons are not allowed to use mechanical or electronic devices to record sound or images within 100 feet of the voting stations. TEX. ELEC. CODE §§ 61.014, 81.002.

- **What devices should not be used in the polling place?**
  - Cell phones
  - Cameras
  - Tablet computers
  - Laptop computers
  - Sound recorders
  - Smart watches capable of messaging or recording sound or images
  - Any other device that may communicate wirelessly, or be used to record sound or images.
  
- **Who does this prohibition apply to at the polling place?**
  - It applies to **all voters** within 100 feet of the voting stations.

- **What about voters with disabilities?**

In recent years, advances in technology have enabled cell phones, tablets, and other wireless communications devices to assist voters with disabilities. As an example, a voter may use a program/application on a cell phone to translate verbal communication into sign language, allowing the voter to understand communication by an election official. While this situation is not expressly addressed in the Election Code, an election judge or early voting clerk may use their authority to allow a voter to utilize these programs/applications at their discretion. If you have any questions, please contact our office.

- **May poll watchers use these devices?**

No. A poll watcher may not be accepted for service if the poll watcher has possession of a device capable of recording images or sound **unless the poll watcher agrees to disable or deactivate the device.** The early voting clerk or presiding judge, as appropriate, may inquire whether a poll watcher has possession of any prohibited recording devices before accepting the poll watcher for service. The poll watcher must sign an oath stating he or she does not have in his or her possession devices capable of recording images or sound, or that he or she will disable or deactivate the devices while serving as a watcher. TEX. ELEC.CODE §§ 33.006, et. seq.

- **May election officials use these devices?**

Yes, if they are using the device to conduct official duties.

- **What if the polling location is also a business location, where a person may need to use a wireless communication device for employment-related matters?**

This is permissible if the person is acting in the course of the person's employment.

- **What if a person enters the 100-foot area while using a wireless communications device or appears to be recording sound/image?**

The early voting clerk and the presiding judge have the authority to require persons to deactivate any such devices and further authority to require persons who do not comply to leave the early voting or election day polling place, as appropriate.

Questions or clarification should be directed to the early voting clerk or the presiding judge in your polling place, as appropriate.

- **How should voters be notified of this law?**

A notice may be posted at the polling place by the early voting clerk or presiding judge. The notice should be posted where it can be read by persons waiting to vote. Our office has prescribed the wording of such a posted notice:

<http://www.sos.state.tx.us/elections/forms/pol-sub/7-9f.pdf>.

If other wording is used, it will need to be approved by our office prior to use.

### **Security Cameras in the Polling Place**

Security cameras are essentially recording devices. If a building is being used as a polling place and has security cameras installed, our advice is to have the cameras turned off during the hours that voting is being conducted if it is possible to do so. If it is not possible, then making sure the cameras do not cover or film the voting areas is essential. We do not believe that turning the voting equipment away from the camera is sufficient. We think that the camera should not view the voting equipment at all.

In addition, recording of sound is a separate but equally serious problem. If it is possible to turn off that feature during the hours of voting, that will be necessary. If not, then our advice is to find another polling location, if possible.

Section 127.1232(b) of the Code requires the general custodian of election records in a county with a population over 100,000 to establish a video recording system that captures all areas containing voted ballots from the time that the ballots are delivered to the central counting station (CCS), early voting ballot board (EVBB), or signature verification committee (SVC) until the local canvass of election results. If the voted ballots will be located in a building that will also be used as a polling place, the cameras must be positioned in such a way that they do not capture any activity in the portion of that building that is used as a polling place.

### **Exit Polling**

The policy of our office is to permit non-disruptive exit polling within the 100-foot boundaries surrounding each early voting and election day polling place. We note that the early voting clerk or presiding judge at each polling place, as appropriate, must determine that such exit polling does not constitute either (1) "loitering" in violation of Section 61.003(a) of the Code or (2) a disruption of order or a contribution to a breach of the peace at the early voting or election day polling place in violation of Section 32.075(a) of the Code, as applicable to early voting under Section 81.002 of the Code. TEX. ELEC. CODE §§ 61.003(a), 32.075, 81.002. Further, persons are not permitted to conduct exit polling inside the location where voting is taking place. TEX. ELEC. CODE § 61.001(a-1).

### **Written Materials**

Voters are allowed to bring written materials into voting stations to assist them in casting their ballot. However, it is important to remember that the prohibition on electioneering within 100-feet of the polling place does apply to written materials. Election judges and early voting clerks may use their discretion in determining if a voter is electioneering for or against any candidate, measure or political party through the use of written materials.

### **Petition Signature Gathering**

Please be advised that any persons who wish to gather petition signatures must do so beyond the 100-foot distance markers. Petition signatures for any type of election may not be collected inside the early voting or election day polling place or within the 100-foot distance marker. Petition gathering is considered electioneering for or against a measure,

which is prohibited within the 100-foot distance marker. TEX. ELEC. CODE §§ 61.003, 85.036.

### **Individuals Permitted in a Polling Place**

Texas Election Code Section 61.001(a-1), as amended by HB 1128 (87th Leg., R.S.), provides a list of individuals who are permitted to be present in a polling place:

- (1) an election judge or clerk;
- (2) a watcher;
- (3) the secretary of state;
- (4) a staff member of the Elections Division of the Office of the Secretary of State performing an official duty in accordance with this code;
- (5) an election official, a sheriff, or a staff member of an election official or sheriff delivering election supplies;
- (6) a state inspector;
- (7) a person admitted to vote;
- (8) a child under 18 years of age who is accompanying a parent who has been admitted to vote;
- (9) a person providing assistance to a voter under Section 61.032 or 64.032;
- (10) a person accompanying a voter who has a disability;
- (11) a special peace officer appointed by the presiding judge under Section 32.075;
- (12) the county chair of a political party conducting a primary election, as authorized by Section 172.1113;
- (13) a voting system technician, as authorized by Section 125.010;
- (14) the county election officer, as defined by Section 31.091, as necessary to perform tasks related to the administration of the election; or
- (15) a person whose presence has been authorized by the presiding judge in accordance with this code.

We hope you find this information helpful. Please contact us at 1-800-252-VOTE (8683) if you have any questions.

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