



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Mark D. Obenshain
Member, Senate of Virginia
Post Office Box 555
Harrisonburg, Virginia 22803

Dear Senator Obenshain:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You seek guidance from this Office to “resolve [issues] relate[d] to First Amendment rights of volunteers at the polls and what if any form of verbal interaction is . . . prohibited by Virginia Code § 24.2-607.” You more specifically inquire whether candidates and campaign representatives are prohibited from initiating contact with voters beyond 40 feet of a polling place to “offer a sample ballot, voting information, campaign literature, petitions for signature, or to offer signs and materials for sale or donation.” You also ask whether these individuals may board or engage with buses or vans used by retirement communities to transport residents to the polls; you are especially concerned with occupants of the vehicles who will be voting curbside and further inquire whether an election officer should allow a candidate or campaign representative “time for free speech exercise” before that officer assists the voter.

Applicable Law and Discussion

In America, “[t]he right to vote is fundamental.”¹ Indeed, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”² Thus, although “political speech is at the core of the protections offered by the First Amendment,”³ the U.S.

¹ *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 229 (4th Cir. 2014). “Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). *See also* VA. CONST. art. I, § 6 (providing that “all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage”).

² *League of Women Voters*, 769 F.3d at 229 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

³ 2014 Op. Va. Att’y Gen. 184, 185 (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007)). The First Amendment to the Constitution of the United States directs that “Congress shall make no law . . . abridging the freedom of speech[.]” U.S. CONST. amend. I; and it is made applicable to the States through the Fourteenth Amendment. *See* *Burstyn v. Wilson*, 343 U.S. 495, 500 (1952). “[T]here is practically universal agreement that a major purpose of [the First]

Supreme Court has “held that ‘some restricted zone [for political speech] is necessary in order to serve the States’ compelling interests in preventing voter intimidation and election fraud.’”⁴ In furtherance of these interests, Virginia has enacted several statutes to protect citizens as they actively seek to exercise their right to vote,⁵ a right that encompasses “the right to cast a ballot in an election free from the taint of intimidation and fraud.”⁶

Among these statutes is Code § 24.2-604, which imposes certain restrictions “within 40 feet of any entrance of any polling place[.]” A “polling place” is the structure that contains “the one place provided for each precinct at which the qualified voters who are residents of the precinct may vote[.]” and the “entrance” thereto refers to “an opening in the wall used for ingress to [such] structure.”⁷ Election officers must mark the 40-foot area as a “Prohibited Area,” which is to be in effect while the “polls are open and ballots are being counted, or within one hour of opening or after closing.”⁸ Per § 24.2-604, no one within the prescribed “Prohibited Area” may possess a firearm, loiter, congregate, or “give, tender, or exhibit any ballot, ticket, or other campaign material to any person or [] solicit or in any manner attempt to influence any person in casting his vote[.]”⁹ The statute also makes it unlawful “to hinder or delay a qualified voter in entering or leaving a polling place[.]”¹⁰ In addition, § 24.2-1006 establishes that “no person shall directly or indirectly advise or assist any voter as to how he shall cast his ballot after the voter has entered the prohibited area at the polls”¹¹ A violation of these statutes constitutes a Class 1 misdemeanor.¹² The imposition of such restrictions within the 40-foot prohibited area does not run afoul of the First Amendment.¹³

Your inquiry, however, involves conduct you describe as occurring outside of a prohibited area and focuses on application of § 24.2-607(A). Section 24.2-607(A) makes it a Class 1 misdemeanor “to hinder,

Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . and all such matters relating to political processes.” *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). *See also* *Schenk v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) (“Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment[.]”); *Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (“[T]he First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

⁴ *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015) (alteration in original) (quoting *Burson v. Freeman*, 504 U.S. 191, 206 (1992)).

⁵ *See* 2020 Op. Va. Att’y Gen. 53, 54 (noting that “[b]oth state and federal law include provisions designed to ensure that voters may cast their votes free from interference or harassment”).

⁶ *Burson*, 504 U.S. at 211.

⁷ VA. CODE ANN. § 24.2-101 (Supp. 2024).

⁸ Section 24.2-604(A) & (B) (2023).

⁹ Section 24.2-604(A).

¹⁰ *Id.* Similar restrictions apply to those authorized representatives who are permitted in the polling place. *See* § 24.2-604(C).

¹¹ Section 24.2-1006 (2023).

¹² Section 24.2-604(G); 24.2-1006.

¹³ *See Burson*, 504 U.S. at 211 (“[R]equiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise” between the right to speak and the right to vote.). *See Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va.*, 722 F.3d 224, 230 (4th Cir. 2013) (citation omitted) (“A nonpublic forum—such as . . . an election polling place—is entitled to less protection from governmental restriction than a public forum.”).

intimidate, or interfere with any qualified voter so as to prevent the voter from casting a secret ballot.”¹⁴ Unlike those found in §§ 24.2-604 and 24.2-1006, the restrictions contained in § 24.2-607(A) are not limited to the 40-foot prohibited area.¹⁵

The plain language of § 24.2-607(A) does not establish any *per se* prohibition on a candidate or campaign representative initiating contact or engaging with a voter outside the 40-foot prohibited area for the purposes you describe.¹⁶ Rather, it remains “permissible to distribute campaign materials . . . on the property on which a polling place is located and outside of the building containing the room where the election is conducted except as specifically prohibited by law including, without limitation, the prohibitions of § 24.2-604 and the establishment of the ‘Prohibited Area’ within 40 feet of any entrance to the polling place.”¹⁷ Nevertheless, § 24.2-607(A) speaks not only to conduct affecting a voter’s ability to cast his vote generally, but also more specifically to his ability to cast it in secret. The statute’s safeguards thus clearly apply to those who seek assistance in voting outside of the polling place, for “[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter.”¹⁸

Conduct not prohibited under § 24.2-607(A), however, may otherwise be unlawful. Accordingly, § 24.2-607(A) is not to be read in isolation,¹⁹ and other provisions of law apply to the scenarios you present. Section 24.2-607(B) further directs that “[n]o person shall conduct himself in a noisy or riotous manner at or about the polls so as to disturb the election”²⁰ and other law provides that “[a]ny person who intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any other person in giving his vote or

¹⁴ Section 24.2-607(A). To enforce this provision, election officers “may order a person violating this subsection to cease such action. If such person does not promptly desist, the officers of election, or a majority of them, may order the arrest of such person by any person authorized by law to make arrests, and, by their warrant, may commit him to the county or city jail, as the case may be, for a period not exceeding twenty-four hours.” *Id.*

¹⁵ When the General Assembly “has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.” *Tvardek v. Powhatan Vill. Homeowners Ass’n, Inc.*, 291 Va. 269, 277 n.6 (2016) (quoting *Zinone v. Lee’s Crossing Homeowners Ass’n*, 282 Va. 330, 337 (2011)). *See also* 2021 Op. Va. Att’y Gen. 63, 66 (noting that Code § 24.2-607 applies “regardless of any person’s geographical location”).

¹⁶ “A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.” *Davenport v. Little-Bowser*, 269 Va. 546, 555 (2005).

¹⁷ Section 24.2-310 (2023). *See Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 178 (4th Cir. 2017) (“Political parties and their nominees are entirely free to publicize their association with each other and may even distribute sample ‘party’ tickets on election day, as long as they do not do so within 40 feet of a polling place’s entrance.” (citing § 24.2-604(A))).

¹⁸ *Burson*, 504 U.S. at 207-08. “Virginia offers curbside voting to any qualified voter who is age 65 or older or physically disabled to provide that voter with a less burdensome alternative to casting his or her vote than what the voter might experience going into the polling place and waiting in line to vote.” 2010 Op. Va. Att’y Gen. 134, 136-37; VA. CODE ANN. § 24.2-649.1(A) (Supp. 2024). Although an eligible voter may cast his ballot from his vehicle, he may do so only in a spot designated for such purpose that is within 150 feet of the polling place. Section 24.2-649.1(B).

¹⁹ *Sheppard v. Junes*, 287 Va. 397, 403 (2014).

²⁰ Section 24.2-607(B). The use of a loudspeaker “within 300 feet of a polling place on an election day” is prohibited. Section 24.2-605 (2023).

ballot . . . is guilty of a Class 1 misdemeanor.”²¹ These provisions are not limited to the prohibited area and apply to areas designated for curbside voting.²²

I am aware of no law that affirmatively affords campaigners the right to board vehicles to speak to voters or that requires election officers to grant time to others to engage with nonconsenting voters awaiting assistance to vote. While election officers are instructed to designate an area where curbside voters can “obtain information from candidates and others campaigning outside the polling place[,]” election officials also are directed to “[e]nsure that no campaign materials or campaign personnel are blocking the curbside voting area or [official] signage.”²³

The First Amendment does not require otherwise. Vehicles transporting voters are private property used for private purposes, and the protections of the First Amendment do not confer third party speakers special rights of access in this context.²⁴ Because “expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used,”²⁵ the U.S. Supreme Court recognizes that “[e]ven protected speech is not equally permissible in all places and at all times.”²⁶ Indeed, “[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.”²⁷ Accordingly, “[t]he State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most.”²⁸

In my view, a simple greeting or offer of materials to voters outside a prohibited area would not be sufficient to constitute a violation of Virginia law; however, depending on the circumstances, particular contact could violate Virginia law if performed in an inappropriate manner.²⁹ Factors like the particular words spoken, or the proximity, tone, bearing, and/or volume of the speaker would be relevant in determining whether a violation of Virginia law had occurred. Accordingly, I offer the above analysis as

²¹ Section 24.2-1005(A) (2023) (also making it unlawful to “intimidate[], threaten[], or coerce[], or attempt[] to intimidate, threaten, or coerce a voter to deter or prevent him from voting”). Federal law similarly provides that “[w]hoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives . . . at any election . . . shall be fined under this title or imprisoned not more than one year, or both.” 18 U.S.C. § 594.

²² Law enforcement can be designated to be present at the polls to “preserve order inside and outside the polling place” generally. Section 24.2-606 (2023).

²³ VIRGINIA DEPARTMENT OF ELECTIONS, 2024 GREB Handbook, § 5.3.9 at 13-14 (revised Aug. 2024).

²⁴ *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972). *See also* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (noting “as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns”).

²⁵ *Burson*, 504 U.S. at 197.

²⁶ *Cornelius*, 473 U.S. at 799.

²⁷ *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 12 (2018) (quoting *Cornelius*, 473 U.S. at 799-80). Electioneering restrictions of up to 300 feet have been upheld. *See* *Frank v. Lee*, 84 F.4th 1119 (10th Cir. 2023) (300 feet); *Clark v. Schmidt*, 493 F. Supp. 3d 1018 (D. Kan. 2020) (250 feet); *but see Russell*, 784 F.3d at 1053 (prohibited area of 300 feet unconstitutional).

²⁸ *Mansky*, 585 U.S. at 15-16.

²⁹ *See Russell*, 784 F.3d at 1051 (“The right against voter intimidation is the right to cast a ballot free from threats or coercion; it is not the right to cast a vote free from distraction or opposing voices.”).


general guidance only. Whether any particular conduct runs afoul of Virginia's voter protection laws is a fact-specific inquiry that is beyond the scope of an Opinion of this Office.³⁰ Similarly, whether any specific enforcement measure taken to protect a voter's right to vote "in a free and unimpaired manner"³¹ would constitute a violation of a particular speaker's First Amendment rights is a factual determination upon which I am unable to render an opinion.³²

Conclusion

In sum, your inquiry presents issues related to what the U.S. Supreme Court describes as "a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy."³³ Properly tailored voter protection laws generally do not violate the First Amendment,³⁴ but "it is possible for a statute or ordinance to be facially valid, and yet unconstitutional as applied in a particular case."³⁵ Accordingly, my guidance is general in nature: the questions of whether specific expressive activity violates voter protection laws and whether the enforcement of such laws in a particular circumstance runs afoul of the First Amendment both require fact-specific determinations and analysis beyond the scope of an Opinion.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

³⁰ "For many years, Attorneys General of Virginia have concluded that § 2.2-505, the authorizing statute for . . . opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law." 2003 Op. Va. Att'y Gen. 21, 24. Moreover, "the application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth's Attorney, the grand jury and the trier of fact." 2010 Op. Va. Att'y Gen. 96, 98.

³¹ *Reynolds*, 377 U.S. at 562 (further stating that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system").

³² *Cf.* 2002 Op. Va. Att'y Gen. 161, 162 (noting that whether a person's constitutional "right to due process has been violated will turn on the facts of a specific case").

³³ *Burson*, 504 U.S. at 198.

³⁴ *See id.* at 198-99.

³⁵ *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 336 (2010).