

## BALLOT SELFIES: NEW POLITICAL SPEECH IN SEARCH OF FIRST AMENDMENT PROTECTION IN SOCIAL MEDIA

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When pop star Justin Timberlake filled out his ballot for the 2016 election in October, he did not simply cast his vote and perform his civic duty; he documented the event by taking a digital photograph of himself and then posting it to his millions of followers on social media.<sup>1</sup> He exercised his democratic right to vote and then engaged in a modern form of self-expression.<sup>2</sup> He appended a message to his posting from that Memphis polling place: “No excuses, my good people! There could be early voting in your town too. If not, November 8th! Choose to have a voice! If you don’t, then we can’t HEAR YOU! Get out and VOTE!”<sup>3</sup>

His expression and message, however, also constituted a misdemeanor under Tennessee law, which could result in thirty days in jail and a fifty dollar fine, because the state has a law prohibiting photography at polling places.<sup>4</sup> State officials in Tennessee acknowledged that Timberlake’s “selfie” likely violated state law, and they praised him for his public enthusiasm for his democratic participation, civic engagement, and encouragement

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1. Katie Reilly, *Justin Timberlake May Have Broken the Law When He Took a Ballot Box Selfie*, TIME (Oct. 25, 2016), <http://time.com/4545024/justin-timberlake-tennessee-voting-selfie-violation/?iid=sr-link1>.

2. Andrea Mandell, *Justin Timberlake’s Voting Selfie May Have Broken the Law*, USA TODAY (Oct. 25, 2016, 3:06 PM), <https://www.usatoday.com/story/life/people/2016/10/25/justin-timberlakes-voting-selfie-may-have-broken-law/92728472>.

3. *Id.*

4. TENN. CODE ANN. § 2-7-142(b) (Supp. 2017) (“Any voter using a mobile electronic or communication device as allowed in subsection (a) shall be prohibited from using the device for telephone conversations, recording, or taking photographs or videos while inside the polling place.”).

to others to vote, while vowing that law enforcement would not seek to prosecute him.<sup>5</sup> A spokesman for the Tennessee Secretary of State said:

We're thrilled Justin can't stop the feeling when it comes to voting so much that he voted early in person and is promoting voting to his millions of fans . . . We hope this encourages more people than ever to vote, but Tennesseans should only use their phones inside polling locations for informational purposes to assist while voting.<sup>6</sup>

The potentially illegal photograph was also taken down from Twitter and Instagram.<sup>7</sup> Timberlake's civic engagement and social media self-promotion put the issue of the "ballot selfie" into the national spotlight, while triggering a public debate on First Amendment rights.<sup>8</sup> Even before Timberlake's posting, however, voters in courts in nearly a half-dozen states tested the First Amendment rights and limits of the ballot selfie.<sup>9</sup>

Self-expression and social media have collided head-on with politics, election law, and public policy in the new-found "ballot selfie" controversy. Because of the way polling places and voting procedures are regulated through state law, the ballot selfie has created a modern First Amendment controversy.<sup>10</sup> Ballot selfie cases have reached five courts in the past two years with mixed results, including a split between the First and Sixth Circuits.<sup>11</sup> In April, the United States Supreme Court, without opinion, declined to review an appeal in one of the cases.<sup>12</sup> The inconsistent court decisions create a cloud of confusion

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5. Clay Bailey, *Timberlake Voting Selfie Removed from His Social Media*, COM. APPEAL, (Oct. 26, 2016, 12:27 PM), <https://www.commercialappeal.com/story/entertainment/2016/10/26/timberlake-voting-selfie-removed-his-social-media/92774190>.

6. Reilly, *supra* note 1.

7. Mandell, *supra* note 2.

8. Roy S. Gutterman, *The Ballot Selfie and the First Amendment*, HUFFINGTON POST (Nov. 7, 2017, 1:24 PM), [https://www.huffingtonpost.com/roy-s-gutterman/the-ballot-selfie-and-the\\_b\\_12845812.html](https://www.huffingtonpost.com/roy-s-gutterman/the-ballot-selfie-and-the_b_12845812.html).

9. Mandell, *supra* note 2.

10. Gutterman, *supra* note 8.

11. *Crookston v. Johnson*, 841 F.3d 396, 401 (6th Cir.), *rev'd on other grounds*, 854 F.3d 852 (6th Cir. 2016).

12. *Gardner v. Rideout*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (Apr. 3, 2017).

surrounding this new form of personal expression and speech and also redefine the modern conception of political speech.

The National Conference of State Legislatures called the issue of ballot selfies “a hot one in legislatures.”<sup>13</sup> In 2017, more than a dozen states had undertaken measures touching on ballot selfies, mostly new laws or the repeal of existing laws governing photography at and around polling places and the secrecy of the ballot.<sup>14</sup> The National Conference of State Legislatures reported:

The explosion of social media and “selfie” culture has also challenged the traditional thinking that voters should not disclose how they voted. Many young people, who share everything on social media, find it logical that they should be able to share a photo of their voted ballot with friends and followers. “Get-out-the-vote” organizations also find posting these “ballot selfies” to be a motivating factor for younger people to participate in the voting process.<sup>15</sup>

In order to ensure fair elections, states have developed relatively straight-forward bodies of law governing what transpires at and around polling places.<sup>16</sup> These laws also govern what happens inside the voting booth itself, perhaps the most private, yet democratic moment any citizen experiences.<sup>17</sup> But with the advent of digital photography, cellular technology, the blanket of wireless communications, and access to the world facilitated by social media and other apps, anyone with a smart phone or a cell phone can now share that private moment with the rest of the world. The process of capturing the voting moment and sharing that selfie can become a crime in many states.<sup>18</sup> This can conflict with the long-standing public policy of maintaining the integrity of

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13. *Secrecy of the Ballot and Ballot Selfies*, NAT’L CONF. ST. LEGISLATURES (Feb. 23, 2017), <http://www.ncsl.org/research/elections-and-campaigns/secrecy-of-the-ballot-and-ballot-selfies.aspx>.

14. *Id.*

15. *Id.*

16. Gutterman, *supra* note 8.

17. *Id.*

18. *Secrecy of the Ballot and Ballot Selfies*, *supra* note 13.

the electoral process, particularly protecting the sanctity of the secret ballot.<sup>19</sup>

Thus, the conflict. Criminalizing speech and expression can violate the First Amendment. But the question is more complicated, and it requires a closer look under both strict and intermediate scrutiny to determine whether state governments are singling out forms of speech for punishment, or whether the state has a compelling or significant interest in barring the speech.

This article will examine the First Amendment implications of state election laws that govern the selfie phenomenon. Part I will look at voting and the law surrounding voting, ballots, and polling places. Part II will look at the selfies, the “ballot selfie,” and political speech under the First Amendment. Part III will look at the five reported opinions dealing with these questions. Part IV will discuss and analyze the cases and weigh the free speech implications against the states’ interest in preserving elections. It will also discuss legislative history surrounding recent state efforts to protect ballot selfies and borrow analysis from law concerning the media’s First Amendment rights with regard to exit polling. Part V will conclude the argument with a recommendation.

## I. VOTING, BALLOTS, AND POLLING PLACES

### A. Voting

Voting confers perhaps the most engaged level of citizenship available.<sup>20</sup> Voting is protected both under the First Amendment and the Equal Protection Clause.<sup>21</sup> A significant component of the tumultuous *Bush v. Gore* case involved the one-person, one-vote concept, which is entitled to legal protection.<sup>22</sup> Elihu Root, the nineteenth and early twentieth century lawyer, statesman, and political theorist, wrote of the importance of citizen participation, through both criticism of public officials and

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19. *Id.*

20. *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (“[V]oting is of the most fundamental significance under our constitutional system.”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No 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.”).

21. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983).

22. *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *see also Reynolds v. Sims*, 377 U.S. 533 (1964).

public policy and through the ballot box.<sup>23</sup> In a series of lectures at Yale University in 1907 Root wrote:

The man who does not think it worth while to exercise his right to vote for public officers, and on such public questions as are submitted to the voters, is strangely ignorant of the real basis of all the prosperity that he has or hopes for and of the real duty which rests upon him as a matter of elementary morals; while the man who will not take the trouble to vote is a poor-spirited fellow, willing to live on the labors of others and to shirk the honorable obligation to do his share in return.<sup>24</sup>

Political scientist Judith Shklar believes voting goes beyond simply civic engagement, even conferring some degree of social standing among citizens.<sup>25</sup> Shklar wrote, “The ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity.”<sup>26</sup> Shklar added, “Good citizenship as political participation, on the other hand, concentrates on political practices, and it applies to the people of a community who are consistently engaged in public affairs.”<sup>27</sup>

Shklar also points out that the Constitution is silent on citizenship until the Fourteenth Amendment, but it also weighs in on age as a component of voting, hence, full citizenship.<sup>28</sup> The ballot selfie issue might cleave on generational terms, and also political terms, because studies indicate that younger voters lean

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23. ELIHU ROOT, EXPERIMENTS IN GOVERNMENT AND THE ESSENTIALS OF THE CONSTITUTION 38–39 (1913) (“No system of self-government will continue successful unless the voters have sufficient public spirit to perform their own duty at the polls, and the attempt to reform government by escaping from the duty of selecting honest and capable representatives, under the idea that the same voters who fail to perform that duty will faithfully perform the far more onerous and difficult duty of legislation, seems an exhibition of weakness rather than of progress.”).

24. ELIHU ROOT, THE CITIZEN’S PART IN GOVERNMENT 37 (1907).

25. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2 (1991).

26. *Id.*

27. *Id.* at 5.

28. *Id.* at 15.

toward the liberal side of the political spectrum.<sup>29</sup> The ballot selfie issue could be the latest salvo in age-related voting regulation disputes.<sup>30</sup> Timberlake's tweet certainly seemed to target youthful voters, and some of the other litigants appeared to be in their twenties, though age was not necessarily a clear factor.<sup>31</sup>

### *B. The Secret Ballot*

When a citizen enters the voting booth and pulls the lever, punches the card, or presses a button, that moment is both inherently democratic and private.<sup>32</sup> Voting procedures, mechanisms, and ballot design are within the province of state and local government.<sup>33</sup> Root also warned that extensive ballots could overcomplicate and even confuse voters, calling for what he called "Short Ballot" reform.<sup>34</sup> This section will look at the history of the secret ballot and its role in ensuring fair, safe elections, and its intent to remove voter fraud and set up the discussion for how these issues relate to the ballot selfie phenomenon.

Though voters have First Amendment rights associated with the voting act<sup>35</sup>—which could just as well be vested in the voters' privacy rights—regulations governing voter secrecy that drive the controversy over ballot selfies have less to do with that voter's right to privacy and more to do with maintaining the integrity of the electoral process itself. The laws affecting ballot selfies rest on ensuring the secret ballot, also known as the "Australian ballot."<sup>36</sup>

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29. *Young Voters in the 2016 General Election*, CIVICYOUTH.ORG, [https://civicyouth.org/wp-content/uploads/2016/11/CIRCLE-Full-Exit-Poll-Analysis\\_Final.pdf](https://civicyouth.org/wp-content/uploads/2016/11/CIRCLE-Full-Exit-Poll-Analysis_Final.pdf) (last visited Feb. 25, 2018).

30. See generally Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 656 (2017) (arguing some recent state elections laws violated the 26th Amendment rights of young voters); Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63, 66–67 (2017) (arguing that lowering the voting age to sixteen would improve the democracy).

31. See *infra* Part III.

32. See generally ROY G. SALTMAN, *THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE* 198 (2006).

33. *Bush v. Gore*, 531 U.S. 98, 126 (2000) (Stevens, J., dissenting).

34. ROOT, *supra* note 23, at 36.

35. See generally *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

36. JOHN H. WIGMORE, *THE AUSTRALIAN BALLOT SYSTEM AS EMBODIED IN THE LEGISLATION OF VARIOUS COUNTRIES* 2–3 (1889).

The secret ballot is intended to remove pressures and outside influence from the voting booth.<sup>37</sup> The legally-compelled secrecy within the voting booth seeks to limit, if not entirely remove, voter intimidation, coercion, and fraud from the voting equation.<sup>38</sup> In one of the first seminal studies of the secret ballot system written in the United States, Dean John Henry Wigmore wrote:

By compelling the honest man to vote in secrecy it relieves him not merely from the grosser forms of intimidation, but from more subtle and perhaps more pernicious coercion of every sort. By thus tending to eradicate corruption and by giving effect to each man's innermost belief, it secures to the Republic what at such a juncture is the thing vitally necessary to its health, — a free and honest expression of the convictions of every citizen.<sup>39</sup>

The “secret ballot” has been employed in voting and governance as far back as the fifth century B.C., when Athenians used secret clay ballots to expel persons deemed dangerous to the state.<sup>40</sup> Historians and archeologists also point to a history of secret ballots and voting in India in 300 B.C., Rome in 139 B.C., and in various communes and city-states in Italy during the Middle Ages.<sup>41</sup>

The word ballot itself comes from the Italian, *ballotta* or *balla*, which translates to English as “ball” or “a little ball used in secret voting; the method of secret voting by means of balls, printed or written slips, etc., deposited in a box or the like.”<sup>42</sup> By the mid-1600s, bullets, a precursor to our ballots, were first used in England, where, “The voter made his choice by secretly depositing in the ballot-box the bullet for or against the person or purpose at issue, immediately returning the other bullet to its original box.”<sup>43</sup>

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37. SALTMAN, *supra* note 32, at 96.

38. L. E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* 33 (1968).

39. WIGMORE, *supra* note 36, at 32.

40. SPENCER D. ALBRIGHT, *THE AMERICAN BALLOT* 9 (1942).

41. *Id.* at 9–10.

42. *Id.* at 9; *see also* FREDMAN, *supra* note 38, at 1.

43. ALBRIGHT, *supra* note 40, at 12.

The practice of secret voting initially made its way to America's shores through both British and Dutch influence, first employed in 1629 by congregants of the Salem church.<sup>44</sup> "This fact supports the contention that the written ballot emerged as the fruit produced by the development of the democratic and elective principles of the Congregational form of the Christian Church."<sup>45</sup>

The birth of the modern secret ballot is widely credited to an Australian legislator from South Australia, Francis S. Dutton.<sup>46</sup> First introduced in 1851, Dutton considered his efforts to create the secret ballot to be his greatest achievement during his fourteen years in government service.<sup>47</sup> The secret ballot—its designers hoped—would cut down on rampant violence, rioting, bribery, intimidation, corruption, and disorder that accompanied Australian elections.<sup>48</sup> In a similar movement, Australia's first successful secret ballot legislation passed in 1857 under the guidance of William Nicholson of Victoria.<sup>49</sup>

In 1869, Dutton testified before the parliament-appointed Hartington Committee: "The very notion of exercising coercion and improper influence absolutely died out of the country."<sup>50</sup> He further testified:

Before the ballot was in operation our elections were exceedingly riotous. Of course our community had the rowdy elements as well as other countries, and on election days these troublesome elements came to the surface; and I have been in the balcony of an hotel during one of the city elections when the raging mobs down in the street were so violent that I certainly would not have risked my life to have crossed the street.<sup>51</sup>

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44. *Id.* at 14.

45. *Id.*

46. WIGMORE, *supra* note 36, at 3.

47. *Id.* at 3–4.

48. *Id.* at 3–5. Dutton's efforts were written into law by the Ballot Act of 1862. *Id.*

49. ALBRIGHT, *supra* note 40, at 23.

50. *Id.* at 24.

51. Eldon Cobb Evans, A History of the Australian Ballot System in the United States 17 (dissertation, University of Chicago 1917) (quoting Parliamentary Papers, VIII, 358 (1868–69)).



In the United States political arena, Henry George was the “American Dutton.”<sup>52</sup> Along with Robert Schilling, they were the American “pioneers of the Australian ballot.”<sup>53</sup> George, a California newspaper editor and later United Labor Party candidate for Mayor of New York City, wrote a seminal essay in 1871 in the *Overland Monthly* titled “Bribery in Elections,” which called for widespread adoption of the secret ballot.<sup>54</sup> Later, in 1883, George wrote in another influential essay, “Money in Elections,” that the secret ballot would be “the greatest single reform.”<sup>55</sup>

Another of the earliest advocates for the secret ballot in America was Milwaukee, Wisconsin, newspaper editor, Schilling, whose newspaper, the *Milwaukee National Reformer*, advocated for the new system in 1881.<sup>56</sup> Spencer Albright wrote:

The Wisconsin Act of 1887 provided that the voter be given the opportunity to mark and deposit his ballot in secret, but the ballots were to be furnished by the several political parties to the election officials or could be secured by the voter before the election. During this time agitation increased in other states for the Australian system.<sup>57</sup>

Among the planks in the 1888 Labor Party political platform, advocated for by both George and Schilling, was a call for secret ballots:

Since the ballot is the only means by which in our republic the redress of political and social grievances is to be sought, we especially and emphatically declare for the adoption of what is known as the Australian system of voting, in order that the effectual secrecy of the ballot, and the relief

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52. FREDMAN, *supra* note 38, at 32; *see* WIGMORE, *supra* note 36, at 23.

53. FREDMAN, *supra* note 38, at 32–33. *See generally* SALTMAN, *supra* note 32, at 96.

54. FREDMAN, *supra* note 38, at 32.

55. *Id.* at 33.

56. WIGMORE, *supra* note 36, at 23; ALBRIGHT, *supra* note 40, at 25. *See generally* *Doings of Populists*, WKLY. WIS., Sept. 2, 1896, at 7; *Bryan Feels the Sword of the Gold Standard Democrats*, WKLY. WIS., Oct. 17, 1896, at 4 (documenting that in the 1890s, Schilling was a prominent figure in Milwaukee and Wisconsin’s Populist Party).

57. ALBRIGHT, *supra* note 40, at 25.

of candidates for public office from the heavy expenses now imposed upon them, may prevent bribery and intimidation, do away with practical discriminations in favour of the rich and unscrupulous, and lessen the pernicious influence of money in politics.<sup>58</sup>

The movement to adopt the “Australian ballot” emerged in the mid-to-late nineteenth century.<sup>59</sup> The ballot system—which was generally organized by parties, unions, and gangs, advocates argued—was corrupted and abused by parties and unions.<sup>60</sup> The corrupt practices by New York City’s “Boss,” Tweed Ring, as well as the 1876 presidential election of Rutherford B. Hayes, which was notoriously corrupt, along with a wide range of other election-related chicanery—including fraud, vote-buying, and intimidation, along with urban population growth and chaotic westward expansion—inspired adoption of the Australian ballot format.<sup>61</sup>

Paper ballots also replaced the “viva voce” voting method in almost every state by the mid-1800s:

The term ‘ballot,’ however, meant one or several pieces of paper which contained the names of the candidates and the designation of the offices, and which were used by the electors in voting. The ballots could be either written or printed; but were, as a matter of fact, almost always printed.<sup>62</sup>

Ballots and tickets were sometimes different colors, which reflected the candidate or party affiliation, effectively vitiating anonymity, and opening up voters to potential pressure and possible influence.<sup>63</sup> Albright described that “the informality of balloting by slips of paper prepared by the voter himself gave way to party uniformity through ballots, printed or written, or partly

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58. FREDMAN, *supra* note 38, at 33.

59. SALTMAN, *supra* note 32, at 96.

60. ALBRIGHT, *supra* note 40, at 20.

61. See SALTMAN, *supra* note 32, at 71–87.

62. Evans, *supra* note 51, at 6.

63. *Id.* at 6–7 (“Another reason for making the tickets distinguishable was to discover how the elector voted. This was the greater of the two evils, and greatly facilitated corruption and intimidation.”).

printed and partly written, distributed by candidates and party workers.”<sup>64</sup>

The first recognized efforts to legally incorporate the Australian ballot in the United States appear to be the Philadelphia Civil Service Reform Association in 1882, while Michigan appears to be the first state to propose legislation for the secret ballot, in an initiative proposed by George W. Walthew in 1885.<sup>65</sup> The bill was based on the Australian format.<sup>66</sup> Kentucky, though, became the first state to pass an Australian ballot-style process in 1888.<sup>67</sup>

The rationale for the secret ballot is explained as: “By compelling the dishonest man to mark his vote in secrecy, it renders it impossible for him to prove his dishonesty, and thus deprives him of his market for it.”<sup>68</sup> Even access to the ballot itself is rooted in First Amendment doctrine.<sup>69</sup>

The teeth to protect the ballot system came through criminal laws, which Eldon Cobb Evans, author of the 1917 history of the secret ballot in the United States, wrote, “have been added to safeguard the purity of the ballot.”<sup>70</sup> But these “special safeguards” mostly focused on mutilation or alteration of ballots or removal of candidates rather than the underlying purpose of protecting the election itself from fraud or intimidation.<sup>71</sup> Though the policy of secrecy should ensure the privacy of the ballot with a bend toward the fraudulent aspects of voter secrecy, the conflict that the ballot selfie presents likely could never have been envisioned by the likes of Dutton, George, or Schilling more than a century ago.

### *C. Polling Places*

State regulations of voting procedures and permissible conduct at and around polling places also emerged from the same

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64. ALBRIGHT, *supra* note 40, at 20.

65. WIGMORE, *supra* note 36, at 23.

66. Evans, *supra* note 51, at 18.

67. *Id.* at 19.

68. WIGMORE, *supra* note 36, at 53.

69. *See also* Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693 (2016). *See generally* *Burdick v. Takushi*, 504 U.S. 428 (1992) (applying *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

70. Evans, *supra* note 51, at 55.

71. *Id.*

reform movements that inspired the adoption of the secret or Australian ballot.<sup>72</sup> In *Burson v. Freeman*, the Supreme Court in 1992 recounted the history and rationale behind voter secrecy laws and other regulations intended to remove fraud and intimidation from the polling place.<sup>73</sup> Each state has implemented some regulations that limit access to and behavior at and around polling places as a means to ensure safe, open elections free and clear of voter intimidation.<sup>74</sup> This, the Court held, was a compelling state interest.<sup>75</sup>

*Burson* involved a Tennessee law barring solicitation of votes and displaying campaign materials within 100 feet of a polling place entrance.<sup>76</sup> The law creating a “campaign-free zone” carried a misdemeanor penalty punishable by a thirty-day prison sentence or a fine of up to fifty dollars.<sup>77</sup> The challenge in *Burson* represents a collision between voting, polling place regulation, and the First Amendment, because the conduct in question was unmistakably speech, particularly political speech.<sup>78</sup> Though the law was not content neutral, the court did find that the state achieved a compelling government interest.<sup>79</sup> The two compelling interests were allowing citizens to vote freely and permitting the state to conduct fair, honest, and reliable elections.<sup>80</sup> These are “indisputably” compelling interests.<sup>81</sup>

But the conflict with expressive activity protected under the First Amendment is also a controversial conflict:

At the same time, however, expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used. Accordingly, this Court has held that the

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72. See *Burson v. Freeman*, 504 U.S. 191, 202–07 (1992); see also U.S. CONST. art. I, § 4, cl. 1 (noting that states are empowered to prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives”).

73. *Burson*, 504 U.S. at 202–07.

74. *Id.* at 206.

75. *Id.* at 208.

76. *Id.* at 193.

77. *Id.* (citing TENN. CODE ANN. §§ 2-19-119, 40-35-111(e)(3) (1990)).

78. *Id.* at 196.

79. *Id.* at 199.

80. *Id.* at 198–99.

81. *Id.* at 199 (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).

government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.<sup>82</sup>

First Amendment rights and the tensions of polling places also collided in a series of cases involving media entities and their newsgathering rights associated with exit polls.<sup>83</sup> While the polling place may be a limited public forum under *Burson*, the physical ballot itself has never been recognized as a public forum.<sup>84</sup> In *Timmons v. Twin Cities Area New Party*, the Court emphatically wrote that “[b]allots serve primarily to elect candidates, not as forums for political expression.”<sup>85</sup>

In *Burdick v. Takushi*, the plaintiff wanted to write in Donald Duck on an election ballot as a protest vote, because he was dissatisfied with the other candidate, arguing that this was his First Amendment right.<sup>86</sup> The Court, however, ruled that the prohibition on write-in candidates was a viable and “legitimate” means to ensure the integrity and maintain smooth operation of voting and elections.<sup>87</sup> “Here, the State’s interests outweigh petitioner’s limited interest in waiting until the eleventh hour to choose his preferred candidate,” the Court wrote, eschewing the First Amendment interests associated with this type of voting.<sup>88</sup>

The act of physically marking the ballot and conduct within the voting booth itself touch on expressive conduct, thus speech, which inches closer to the ballot selfie issue. But taking a picture

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82. *Id.* at 197.

83. *See infra* Part IV.C.

84. *Burdick v. Takushi*, 504 U.S. 428, 432–42 (1992) (holding a law barring voters from writing in candidates’ names was not an unreasonable violation of a voter’s First Amendment rights); *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 373 (1997) (“Our conclusion that the ballot is not principally a forum for the individual expression of political sentiment through the casting of a vote does not justify the conclusion that the ballot serves no expressive purpose for the parties who place candidates on the ballot.”); *Burson*, 504 U.S. 191.

85. *Timmons*, 520 U.S. at 363; *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 (2008).

86. *Burdick*, 504 U.S. at 438.

87. *Id.* at 439.

88. *Id.*

of oneself while voting inside the voting booth is not alteration or mutilation of the ballot and may not necessarily be disruptive. The ballot selfie more likely than not is not a direct solicitation of potential voters. But the concern that the ballot selfie vitiates the secrecy of the ballot remains, even though it has to be balanced against the newly-found First Amendment rights associated with taking a selfie. Enter the selfie.

## II. SELFIES AND THE LAW

There is not a deep body of law surrounding the relatively new phenomenon of the selfie.<sup>89</sup> Even amid the scant case law from courts around the United States, cases involving selfies generally revolve around the photographs as evidence in criminal cases,<sup>90</sup> juvenile delinquency,<sup>91</sup> and intellectual property disputes.<sup>92</sup> Outside traditional and general legal disputes, there were no First Amendment implications being tested by selfies until the birth of the ballot selfie controversy in the past two years.<sup>93</sup>

As a free speech issue, though, the selfie's role clearly falls within the scope of the First Amendment. Speech means different things to different people. In the most literal definition, speech constitutes verbal communication.<sup>94</sup> Regardless of how individuals and courts define speech, the First Amendment and the application of the Fourteenth Amendment provide that government will not make laws infringing on free speech, unless there is a compelling government interest.<sup>95</sup> Obviously, speech is more complicated and nuanced.<sup>96</sup> "The First Amendment affords

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89. As of February 15, 2018, a LEXISNEXIS database search generated 22 references to selfies in reported opinions.

90. *Edwards v. State*, 497 S.W.3d 147, 154 (Tex. Crim. App. 2016); *People v. Walsh*, 53 N.E.3d 392, 394 (Ill. App. Ct. 2016).

91. *In re Anthony P.*, No. 1–15–1679, 2015 Ill. App. (1st) 151679-U, at \*3–4 (Ill. App. Ct. Nov. 4, 2015).

92. *Arcsoft v. Cyberlink*, 153 F. Supp. 3d 1057 (N.D. Cal. 2015).

93. Daniel A. Horwitz, *A Picture's Worth a Thousand Words: Why Ballot Selfies Are Protected by the First Amendment*, 18 SMU SCI. & TECH. L. REV. 247, 249 (2015) (arguing that the first two cases testing the question should result in First Amendment protection).

94. See TIMOTHY GARTON ASH, *FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD* 7–10 (2016).

95. *Reed v. Gilbert*, 135 S. Ct. 2218, 2222 (2015).

96. *Id.* at 2218–19.

protection to symbolic or expressive conduct as well as to actual speech,” the Supreme Court wrote in *Virginia v. Black*.<sup>97</sup>

Free speech principles are infused in a broad range of both communications and communicative behavior, such as clothing,<sup>98</sup> signs,<sup>99</sup> music,<sup>100</sup> art,<sup>101</sup> video games,<sup>102</sup> and even commercial illustrations and photographs.<sup>103</sup> These protections are vital to citizen expression and are inherently American—even a human right.<sup>104</sup>

These rights are supported by media platforms, perhaps none more than modern social media. The ubiquity of both the internet and social media, and its role as the “modern public square,” was most recently articulated and amplified by the Supreme Court in *Packingham v. North Carolina*.<sup>105</sup> Social media, such as Facebook, Twitter, YouTube, Instagram, Snapchat, and others have given ordinary citizens both platforms to express themselves and a potentially unlimited global audience.<sup>106</sup> Social media use and participation is so widespread that a 2016 study notes that sixty-eight percent of all American adults use Facebook, while twenty-one percent use Twitter, twenty-six percent use Pinterest, and twenty-eight percent use Instagram.<sup>107</sup> Further, a

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97. *Virginia v. Black*, 538 U.S. 343, 358 (2003) (regarding the act of cross burning).

98. *Cohen v. California*, 403 U.S. 15 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (involving students wearing armbands to protest the government’s policy in Vietnam).

99. *Reed*, 135 S. Ct. at 2231.

100. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

101. *Miller v. California*, 413 U.S. 15, 34 (1973).

102. *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 790 (2011).

103. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985) (“The use of illustrations or pictures . . . serves important communicative functions: it attracts the attention of the audience to the advertiser’s message, and it may also serve to impart information directly.”).

104. *See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION* 6–9 (1970).

105. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). The court overturned a state law barring registered sex offenders from using certain websites finding the statute an overbroad application of law. *Id.* at 1738.

106. KATHRYN L. OSSIEN, *SOCIAL MEDIA AND THE LAW* 1–3 (Paul Matsumoto ed., 2017) (“Social networking sites are perhaps the most common and well-known form of social media. Sites like Facebook, LinkedIn, GooglePlus, Instagram, Twitter, and Pinterest invite users to establish online profiles through which they can share information as well as post photographs and videos either to the general user community or to a small group of other users to whom the poster is connected by mutual acceptance within the particular social networking site.”).

107. SHANNON GREENWOOD ET AL., PEW RESEARCH CTR., *SOCIAL MEDIA UPDATE 2016*, at 3 (2016). “More than half of online adults (56%) use more than one of the five social

large portion of the 64% of American adults who own a smartphone are also actively using messaging apps.<sup>108</sup>

The “selfie” first made it into the dictionary in 2012, defined as a photograph someone takes of her or himself with a digital camera for posting online.<sup>109</sup> It was even the champion “Word of the Year” in 2013.<sup>110</sup> Though etymologists traced the origins of the word back to an Australian online forum in 2002, the phenomenon did not gain ubiquity until the second decade of the twenty-first century.<sup>111</sup> Fueled by both advances in technology, such as cellular smartphones with self-facing cameras, and the explosion of social media, a reporter for the Minneapolis Star Tribune in one of the first discussions of the phenomenon explained in 2013: “Depending on whom you ask, selfies are either the latest form of self-expression or portraits of narcissism on the rise, society in decline.”<sup>112</sup>

Even as far back as 2013, sites such as Instagram noted more than thirty-six million selfies had been posted, while Snapchat reported more than two hundred million.<sup>113</sup> In a short time, selfies have become “particularly popular among teens and tweens, and a staple for image-obsessed celebrities like Justin Bieber and Rihanna.”<sup>114</sup> Controversies surrounding selfies are diverse.<sup>115</sup> There are even variations of the selfie, including “the celebrity selfie,” a phrase possibly first termed by the actor James Franco,<sup>116</sup> and even the so-called “monkey selfie,” which resulted in an international intellectual property dispute involving a

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media platforms measured in this survey, a share that is statistically unchanged from the 52% who did so in 2014.” *Id.* at 10.

108. *Id.* at 11; see also PEW RESEARCH CTR., U.S. SMARTPHONE USE IN 2015, at 2 (2015).

109. *Selfie*, OXFORD LEARNER’S DICTIONARY, <http://www.oxfordlearnersdictionaries.com/definition/english/selfie> (last visited Feb. 14, 2017).

110. Daniel Menaker, *Taking Our Selfies Seriously*, N.Y. TIMES, Nov. 24, 2013, at SR2.

111. Jennifer Schuessler, *‘Selfie’ Trumps ‘Twerk’ As Word of the Year*, N.Y. TIMES, Nov. 20, 2013, at C3.

112. Katie Humphrey, *Note to Self: Say Cheese*, STAR TRIB., Aug. 18, 2013, at 1E.

113. *Id.*

114. *Id.*

115. Staff, *The Rise of the Narcisstick Say Cheese! Why the Selfie Stick Is the Most Controversial Gift of 2014*, N.Y. POST, Dec. 18, 2014, at 43.

116. James Franco, *Selfies: The Attention Grabber*, N.Y. TIMES, Dec. 29, 2013, at AR20.



crested macaque monkey in Indonesia named Naruto who took a selfie.<sup>117</sup>

The selfie, as philosopher Simon Blackburn recently noted, is a tool and expression of the modern narcissist:

Narcissus might remind us of the swarms of egoists who infest places of interest, art galleries, concerts, public spaces, and cyberspace. For such people, the object of each moment is first to record oneself as having been there and second to broadcast the result to as much of the rest of the world as possible. The smartphone is the curse of public space as people click away with the lens pointed mainly at themselves and only secondarily at what is around them.<sup>118</sup>

This analysis dovetails comfortably with well-established First Amendment theory. In the history of free speech, perhaps nothing exemplifies Thomas Emerson's theory of self-expression and self-fulfillment more than the selfie.<sup>119</sup> The internet, and social media in particular, are the modern public square where speakers interact and express themselves on a potentially infinite number of topics and public issues to a potentially immeasurable audience.<sup>120</sup>

In *Packingham*, the Court reiterated the "soapbox" metaphor, pointing out that social media gives citizens a voice and a mechanism to amplify that voice to a potentially unlimited audience.<sup>121</sup> The Court noted, "Social media allows users to gain access to information and communicate with one another about it

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117. *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 U.S. Dist. LEXIS 11041 at \*1 (N.D. Cal. 2016); *see also id.* at \*8–9 (dismissing copyright claim on behalf of Naruto because animals cannot claim ownership under the Copyright Act).

118. SIMON BLACKBURN, *MIRROR, MIRROR: THE USES AND ABUSES OF SELF-LOVE* 38–39 (2014).

119. *See* EMERSON, *supra* note 104, at 6–9; *see also* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961) (the First Amendment protects education, art, literature and public discussions).

120. *See* OSSIAN, *supra* note 106, at 1–10 ("Blogs, microblogs, and other social media applications provide a real-time, interactive forum for sharing opinions, pushing a particular agenda, or engaging in crucial commentary. No political issue, significant event, or industry is immune from becoming a topic of discussion.")

121. *Packingham v. North Carolina*, 582 U.S. 1, 8 (2017) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

on any subject that might come to mind.”<sup>122</sup> The Court expanded on this in its summary of this section, adding “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”<sup>123</sup>

### A. *The Ballot Selfie*

The ballot selfie is the act of taking a selfie while voting or just after voting while still in the voting booth.<sup>124</sup> Aside from voters’ lawsuits to test their First Amendment rights in New Hampshire, Michigan, Indiana, New York, and Colorado, the issue garnered national headlines with Justin Timberlake’s highly-publicized ballot selfie and his accompanying message to voters.<sup>125</sup> Though unmistakably a moment of not only self-expression, but political speech, the ballot selfie issue likely would not have made any more of a splash on social media than any other postings had Timberlake not been a celebrity. The lawsuits testing the issues failed to gain much traction in the media until Timberlake’s post.<sup>126</sup>

Free speech and political speech collided head-on with state laws governing conduct at polling places.<sup>127</sup> The legal conflict arises with laws that restrict conduct—and in effect speech—at and around polling places.<sup>128</sup> Every state has laws governing what can and cannot happen at polling places.<sup>129</sup> Polling place laws are generally intended to maintain order at the place where people cast their votes by limiting electioneering and campaigning, and they are intended to allow citizens to vote without pressure,

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122. *Id.*

123. *Id.*

124. Daniel Victor, *Selfies in the Voting Booth? Snapchat Fights for the Right*, N.Y. TIMES (Apr. 26, 2016), <https://www.nytimes.com/2016/04/27/us/politics/voting-booth-snapchat-selfies.html>.

125. Reilly, *supra* note 1; Mandell, *supra* note 2.

126. Jefferson Graham, *Want to Take ‘Ballot Selfie’? Here’s Where It’s Legal, and Not*, USA TODAY (Nov. 7, 2016, 10:01 AM), <https://www.usatoday.com/story/tech/news/2016/11/06/ballot-selfie-beware-s-often-illegal-despite-flurry-late-attempts-change/93299316>.

127. *See* Victor, *supra* note 124.

128. *See* *Burson v. Freeman*, 504 U.S. 191, 193 (1992).

129. *See generally* *State Law: Documenting the Vote 2012*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/state-law-documenting-vote-2012> (compiling a comprehensive list of state voting recording laws).

intimidation, harassment, or even fraud and chicanery.<sup>130</sup> The state laws at issue specifically prohibit a voter from showing a completed ballot to another party.<sup>131</sup> These laws are accompanied by criminal sanctions and, in one state, disenfranchisement.<sup>132</sup>

While the public policy purpose behind polling place laws makes sense, many of these laws were enacted decades (sometimes centuries) before the advent of digital photography and social media.<sup>133</sup> The First Amendment clash comes into play when these laws are applied to voters taking selfies, raising questions of whether the laws are content-based restrictions, requiring strict scrutiny, or content-neutral, simply requiring the government to prove a legitimate state interest.<sup>134</sup> The application of the First Amendment and the balancing of rights has been tested in five recent reported opinions with varying outcomes.<sup>135</sup>

### *B. Political Speech and the First Amendment*

Political speech “has always rested on the highest rung of First Amendment values.”<sup>136</sup> Protecting political speech is central to the First Amendment.<sup>137</sup> Some scholars consider political speech, which is a safeguard for self-government, as the most important right afforded protection under the First Amendment.<sup>138</sup> Though this doctrine is inherently part of the origins of the First Amendment, protecting political speech has been a firmly-rooted element in Supreme Court precedent

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130. See *Crookston v. Johnson*, 841 F.3d 396, 400 (6th Cir.), *rev'd on other grounds*, 854 F.3d 852 (6th Cir. 2016).

131. See generally *Justin Timberlake's Ballot Selfie Highlights Mixed Laws*, USA TODAY (Oct. 26, 2016, 7:12 PM), <https://www.usatoday.com/story/news/politics/elections/2016/10/26/states-mixed-ballot-selfie-laws/92793228>.

132. MICH. COMP. LAWS SERV. § 168.738(2) (LexisNexis 2017).

133. See *Crookston*, 841 F.3d at 397 (noting that Michigan enacted a secret ballot law 125 years ago).

134. *Id.* at 402–03 (“The First Amendment prohibits the government from passing laws that abridge the freedom of speech. Courts apply varying levels of scrutiny depending on whether the First Amendment restrictions at issue are content-based restrictions or content-neutral restrictions.” (citation omitted)).

135. See *supra* Part II.

136. *Carey v. Brown*, 447 U.S. 455, 466–67 (1980).

137. See RONALD K. L. COLLINS & SAM CHALTAIN, *WE MUST NOT BE AFRAID TO BE FREE: STORIES OF FREE EXPRESSION IN AMERICA* 15–16 (2011).

138. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 28–29 (1948) (pointing out the contradiction between the freedom of speech and legislative action taken to abridge it).

throughout the twentieth century.<sup>139</sup> In the landmark *New York Times v. Sullivan*, the Court, in Justice Brennan's opinion, took special steps to weigh in on political speech:

The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."<sup>140</sup>

In recent years, the political speech doctrine has weighed heavily in cases ranging from campaign funding<sup>141</sup> to claims in campaign materials<sup>142</sup> to political signage<sup>143</sup> to applying liability for the tort of intentional infliction of emotional distress.<sup>144</sup> In one recent case, *Snyder v. Phelps*, which involved offensive and hateful speech outside military funerals, Chief Justice Roberts wrote: "While these messages may fall short of refined social or political

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139. See generally *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.").

140. *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957); *Stromberg v. California*, 283 U.S. 359, 369 (1931); and *Bridges v. California*, 314 U.S. 252, 270 (1941)).

141. See *Citizens United v. FEC*, 558 U.S. 310, 312 (2010) (holding a campaign finance regulation "chilled" political speech); see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

142. See *Burson v. Freeman*, 504 U.S. 191 (1992) (holding a Tennessee statute preventing the distribution of campaign materials within 100 feet of a polling place did not violate the First Amendment).

143. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

144. *Snyder v. Phelps*, 562 U.S. 443 (2011).

commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.”<sup>145</sup>

In this vein, assessing the value of political speech rests in the speech, not the method. Thus, a selfie, whether regarded as frivolous or “not refined,” could be viewed as a form of political speech ripe for protection of the highest order.

### III. THE CASES

The first legal challenge to a state election law came in October 2014, when a New Hampshire State Representative became the lead plaintiff challenging New Hampshire’s election law.<sup>146</sup> In the two years since, there have been five reported opinions ruling on the ballot selfie issue.<sup>147</sup> This section summarizes and discusses the five disputes.

#### A. *Rideout v. Gardner* (First Circuit, Sept. 28, 2016)

In *Rideout v. Gardner*, the First Circuit Court of Appeals was the first appellate court to rule on ballot selfies in September 2016, finding a New Hampshire law barring this type of photography violated the First Amendment.<sup>148</sup> This case challenged a state law intended to ensure the integrity of the electoral process by attaching a fine of up to \$1,000 for violating the prohibition on showing a completed ballot to another person.<sup>149</sup> The law, which had origins in the late nineteenth century and amended in 1979 and 2014, reads:

No voter shall allow his or her ballot to be seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has

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145. *Id.* at 454.

146. *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017).

147. *See id.* at 67; *Crookston v. Johnson*, 841 F.3d 396, 397 (6th Cir. 2016); *Ind. Civil Liberties Union Found. v. Ind. Sec’y of State*, 229 F. Supp. 3d 817, 820 (S.D. Ind. 2017); *Hill v. Williams*, No. 16–CV–02627–CMA, 2016 WL 8667798, at \*2 (D. Colo. Nov. 4, 2016); *Silberberg v. Bd. of Elections*, 216 F. Supp. 3d 411, 414 (S.D.N.Y. 2016).

148. *Rideout*, 838 F.3d at 68.

149. *Id.*

voted except as provided in RSA 659:20. This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means.<sup>150</sup>

Though there was no evidence that anyone was prosecuted under the law, two of the three plaintiffs challenging the statute were the subject of investigations by the New Hampshire Attorney General's Office.<sup>151</sup> The lead plaintiff, Leon Rideout, is a New Hampshire State Representative and a town Selectman in Lancaster, who took a ballot selfie in September 2014 and later posted it on Twitter and Facebook.<sup>152</sup> He acknowledged in a newspaper interview that he took the photograph and posted it solely to challenge the law, which he believed violated the First Amendment.<sup>153</sup>

The other two plaintiffs, however, Andrew Langlois and Brandon Ross, were investigated by state law enforcement for posting their ballot selfies.<sup>154</sup> Langlois's ballot selfie, which he posted on Facebook, was both virulent and sarcastic, yet unmistakable political speech.<sup>155</sup> Dissatisfied with the slate of Republican candidates for the United States Senate seat, Langlois wrote in the name of his dead dog, "Akira," along with the note: "Because all of the candidates SUCK. I did a write-in of Akira."<sup>156</sup> Ross, a candidate for Congress in 2014, took his ballot selfie and appended the message on Facebook, "Come at me bro."<sup>157</sup>

With the investigations and the threat of prosecutions, the plaintiffs challenged the law in district court, invoking Section 1983, while also seeking an injunction.<sup>158</sup> The state defended the law as integral to protecting the electoral system by preventing voter intimidation, vote buying, and other fraud, which provided

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150. N.H. REV. STAT. ANN. § 659:35 (2017).

151. *Rideout*, 838 F.3d at 69.

152. *Id.* at 70.

153. *Id.*

154. *Id.* at 69.

155. *Id.* at 70.

156. *Id.*

157. *Id.*

158. *Id.*

the state with a compelling interest.<sup>159</sup> The district court ruled the statute failed under strict scrutiny as a content-based restriction.<sup>160</sup>

The First Circuit, finding the law constitutionally deficient, only applied intermediate scrutiny.<sup>161</sup> Because the government was unable to prove a specific connection between the law's purpose and any particular threat to the electoral system, the court did not see that the law addressed an "actual problem."<sup>162</sup> The law's "abstract" and "prophylactic" purpose failed the court's application of intermediate scrutiny.<sup>163</sup> The court also rejected the state's reliance on *Burson v. Freeman*, a 1992 United States Supreme Court case which found a compelling state interest in a state law barring solicitation of votes and the display of campaign materials within 100 feet of a polling place.<sup>164</sup> "The intrusion on voters' First Amendment rights is much greater here than that involved in *Burson*," the court wrote.<sup>165</sup>

Judge Sandra L. Lynch ruled that the law was not narrowly-tailored and the state "has 'too readily forgone options that could serve its interests just as well, without substantially burdening' legitimate political speech."<sup>166</sup> Earlier in the opinion, the court wrote, "Digital photography, the internet, and social media are not unknown quantities—they have been ubiquitous for several election cycles, without being shown to have the effect of furthering vote buying or voter intimidation."<sup>167</sup>

Of particular interest in weighing the impact of digital photography as a form of speech, the court wrote:

The restriction affects voters who are engaged in core political speech, an area highly protected by the First Amendment . . . . A ban on ballot selfies would suppress a large swath of political speech, which "occupies the core of the protection afforded

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159. *Id.*

160. *Id.* at 70–71.

161. *Id.* at 72 (noting the court would not address the substantive differences between strict and intermediate scrutiny).

162. *Id.* (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011)).

163. *Id.*

164. *Id.* at 73–74 (citing *Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

165. *Id.* at 73.

166. *Id.* at 74 (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2537 (2014)).

167. *Id.* at 73.

by the First Amendment” . . . . Ballot selfies have taken on a special communicative value: they both express support for a candidate and communicate that the voter has in fact given his or her vote to that candidate.<sup>168</sup>

*B. Crookston v. Johnson (Sixth Circuit, Oct. 28, 2016)*

In *Crookston v. Johnson*, the Sixth Circuit Court of Appeals, considering the upcoming November 2013 election, refused to extend a stay granted by the district court intended to hold off on Michigan’s election law prohibition against ballot selfies.<sup>169</sup> Here, the plaintiff, Joel Crookston, a registered Michigan voter, challenged two provisions of Michigan’s state’s election law: section 168.579, which prohibits revealing a completed ballot and section 168.738(2), which disqualifies a completed ballot that the voter shows to another.<sup>170</sup> Michigan Secretary of State, Ruth Johnson, had also issued guidelines for polling places prohibiting use of cameras or other recording equipment by voters in and around polling places.<sup>171</sup>

Crookston sought preliminary and declaratory relief, which District Court Judge Janet Neff granted, writing, “The determination of where the public interest lies also depends on a determination of the likelihood of success on the merits of the First Amendment challenge.”<sup>172</sup> The court balanced the Secretary of State’s interests in enforcing state election laws and its rules against plaintiff’s First Amendment rights.<sup>173</sup>

In the 2012 November election, Crookston first tested the state’s laws when he memorialized his write-in vote of a college friend for the position of Michigan State University Trustee with a ballot selfie posted on Facebook.<sup>174</sup> Crookston offered no evidence

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168. *Id.* at 74 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995)).

169. *Crookston v. Johnson*, 841 F.3d 396, 397–98 (6th Cir.), *rev’d on other grounds*, 854 F.3d 852 (6th Cir. 2016).

170. *Crookston v. Johnson*, No. 1:16-CV-1109, 2016 WL 9281943, at \*1 (W.D. Mich.), *rev’d on other grounds*, 854 F.3d 852 (6th Cir. 2016) (citing MICH. COMP. LAWS SERV. §§ 168.579, .738(2) (LexisNexis 2014)).

171. *Id.* at \*5.

172. *Id.* at \*7.

173. *Id.*

174. *Crookston*, 841 F.3d at 398.



that this expressive act resulted in any disenfranchisement or legal sanction.<sup>175</sup>

Crookston's constitutional challenge to the state law came almost two months before Election Day 2016, requiring the courts to view the controversy on an expedited, injunctive, and declaratory relief basis.<sup>176</sup> Thus, the court devoted significant analysis to the emergency application and the merits justifying a stay for an injunction.<sup>177</sup> The court went through a four-point analysis to determine whether an appeal of a stay should be granted, including: (1) the likelihood that the party seeking the stay would win on the merits; (2) the likelihood that the moving party would be irreparably harmed; (3) the prospect that others would be harmed if the stay remained; and (4) the public interest.<sup>178</sup>

The court was extremely skeptical about the emergency nature of the proceedings, noting that Crookston had been aware of the restrictions on recording at polling places for years.<sup>179</sup> The court also delved into the long history of regulations at polling places, with some laws dating back more than 100 years.<sup>180</sup> The court also pointed out that the Michigan Secretary of State's Office had engaged in a public discussion on the topic as early as 2008, when selfies began to emerge as a popular form of expression.<sup>181</sup> The court called Crookston's lawsuit "belated" and stated that "[a] manufactured emergency does not warrant emergency relief."<sup>182</sup> The court seemed irritated that because of the expedited review, the lower court was unable to render a factual finding or conclude how the disenfranchisement sanction related to other state laws.<sup>183</sup>

Turning to its analysis of the statute itself, the court wrote that Michigan's law "seem[ed]" content-neutral and was further

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175. *Id.* at 399.

176. *Id.*

177. *Id.* at 398–99.

178. *Id.* at 398.

179. *Id.* at 398–99.

180. *Id.*

181. *Id.* ("The challenged rules are not new. Michigan's ban on ballot exposure dates to 1891, and today's version of these laws has been on the books since 1996. Even *Crookston* cites a news story showing that the Secretary's ban on recording devices at the polls has been in place since (at least) 2008.")

182. *Id.* at 399.

183. *Id.* at 400–01.

buttressed by “several serious governmental interests.”<sup>184</sup> The court’s most critical passage reads:

The State’s policy advances several serious governmental interests: preserving the privacy of other voters, avoiding delays and distractions at the polls, preventing vote buying, and preventing voter intimidation. Crookston tries to minimize the risk of vote buying as a relic of a bygone electoral era. But plenty of cases—in this circuit alone—show otherwise. The links between these problems and the prohibition on ballot exposure are not some historical accident; they are “common sense.” At the same time, it is far from clear that Crookston’s proposal creates no risk of delay, as ballot selfie takers try to capture the marked ballot and face in one frame—all while trying to catch the perfect smile.<sup>185</sup>

The court invoked the old adage, writing, “[a] picture may be worth a thousand words,” but also argued that the law at issue does not silence social media users who “can (and do) post thousands of words about whom they vote for and why.”<sup>186</sup> The ultimate tests on the law, however, may still be open for analysis or clarification—without dealing with the problem on an emergency basis—the court wrote.<sup>187</sup> With more time and deliberation, this issue may return to the courts in the district or circuit.<sup>188</sup>

A concurring opinion argued that because of the emergency litigation, there was no hearing at the district court and the state did not have the opportunity to defend the law.<sup>189</sup> Judge Ralph B. Guy, Jr. focused on the government’s argument

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184. *Id.* at 399–400.

185. *Id.* at 400 (citations omitted).

186. *Id.* (adding that “[a]lthough the loss of any potential First Amendment freedom deserves serious consideration, the government’s interests in a stay outweigh any imposition on the expressive rights of Crookston and other would-be selfie-takers—particularly given the privacy interests of *other* voters in not having *their* votes made public”).

187. *Id.* at 401.

188. *Id.* (adding that there might be an additional evidentiary issue with the application of the law surrounding mail-in ballots).

189. *Id.* (Guy, J., concurring).

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that allowing ballot selfies would cause undue delays at the polling places:

If one [person] just points the camera at a spot on the ballot and takes a picture this obviously would take little time. If all a person wants is a picture of the ballot that can be done by securing a sample ballot and taking a picture of it. But that is not a selfie for obvious reason that there is no “self.” As to how many might avail themselves of the opportunity to take a selfie, I don’t really know. But I do know that the number of persons who feel compelled to record their every waking moment and broadly share it with others is immense.<sup>190</sup>

In dissent, Chief Judge R. Guy Cole, Jr., focused on the likelihood of success on the merits when addressing the law’s First Amendment implications, which he argued failed even intermediate scrutiny.<sup>191</sup> Much of his rationale drew from *Rideout* and the District Court case in Indiana.<sup>192</sup> Chief Judge Cole was particularly skeptical of the government’s arguments defending the law, writing, “[w]hen a state infringes upon the freedom of speech of its citizens, it cannot simply assert a government interest in the abstract, it must show that those interests exist and are actually served by the prohibitions imposed by the state.”<sup>193</sup>

The government, Chief Judge Cole believed, failed to establish or prove that the law prevented any viable threat to the electoral process.<sup>194</sup> Chief Judge Cole eloquently wrote:

The repercussion of taking a ballot selfie in Michigan is the loss of one’s right to vote. Consequently, this likely unconstitutional law will deprive many of the citizens of Michigan of their right to vote in this election if they exercise their

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190. *Id.*

191. *Id.* at 403 (Cole, J., dissenting).

192. *Id.* at 402–03; see *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017); *Ind. Civil Liberties Union Found. Inc. v. Ind. Sec’y of State*, 229 F. Supp. 3d 817 (S.D. Ind. 2017).

193. *Crookston*, 841 F.3d at 403 (Cole, J., dissenting).

194. *Id.*

First Amendment right to take a ballot selfie. This is one of the highest levels of harm that could result from a law. It is, quite simply, the loss of a fundamental right.<sup>195</sup>

C. *Indiana Civil Liberties Union Foundation v. Indiana Secretary of State (S.D. Indiana Oct. 19, 2015)*

An Indiana District Court granted a preliminary injunction on the ballot selfie issue in October 2015 in *Indiana Civil Liberties Union Foundation v. Indiana Secretary of State*.<sup>196</sup> The Indiana Law specifically addressed ballot selfies, categorizing it as a level six felony.<sup>197</sup> Indiana Code § 3-11-8-17.5(b) states voters may not:

(1) Take a digital image or photograph of the voter's ballot while the voter is in a polling place . . . except to document and report to a precinct election officer, the county election board, or the election division a problem with the functioning of the voting system.

(2) Distribute or share the image described in subdivision (1) using social media or by any other means.<sup>198</sup>

The challenge to the new state law came on a motion for a preliminary injunction in September 2015.<sup>199</sup> The court granted the motion, almost two weeks in advance of the November 2015 election.<sup>200</sup> The state argued that the laws were content-neutral and the prohibition on digital photography applies to both unmarked and completed ballots.<sup>201</sup> The interest, the state argued,

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195. *Id.* at 405.

196. *See* *Ind. Civil Liberties Union Found., Inc. v. Ind. Sec'y of State*, No. 1:15-CV-01356-SEB-DML, 2015 U.S. Dist. LEXIS 182116, at \*1 (S.D. Ind. Oct. 19, 2015), *aff'd*, 229 F. Supp. 817 (S.D. Ind. 2017) (granting plaintiff's motion for preliminary injunction).

197. *Id.*

198. IND. CODE ANN. § 3-11-8-17.5(b) (LexisNexis Cumulative Supp. 2017).

199. *Ind. Civil Liberties Union Found.*, 2015 U.S. Dist. LEXIS 182116, at \*1.

200. *See id.*

201. *Id.* at \*9–10.

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is protecting the integrity of the electoral system and preventing voter fraud and intimidation.<sup>202</sup>

The court discussed the different standards under strict scrutiny for content-based restrictions and intermediate scrutiny for content-neutral laws.<sup>203</sup> “Because this statute clearly defines the regulated expression according to its subject matter and its purpose, it is properly construed as being content based ‘on its face,’” the court held.<sup>204</sup> The court wrote:

Thus, it is clear that the statute before us for review is on its face content based, requiring our strict scrutiny in order to determine its conformance with First Amendment principles. Strict scrutiny is required even though the statute’s terms do not discriminate based on viewpoint and regardless of whether the General Assembly acted with good intentions when it adopted the law.<sup>205</sup>

The court then turned to the law’s tailoring and purpose to determine whether it satisfies a compelling government interest.<sup>206</sup> With nothing but abstract assertions on voter fraud or actual vote buying, the state could not meet the heavy burden of proof.<sup>207</sup> The state’s only proof of vote buying came in the submission of two newspaper articles, one from the 1980s and another from 2008.<sup>208</sup>

The state “failed” to show that the prohibition on digital photography at the polling place addressed an actual problem, prevented vote buying, or “further[ed]” a compelling state interest.<sup>209</sup> The court’s analysis showed that the statute was not narrowly tailored, and it would also be unconstitutional under intermediate scrutiny as overly inclusive.<sup>210</sup> On the First

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202. *Id.* at \*11–12.

203. *Id.* at \*5–11.

204. *Id.* at \*6–7 (citation omitted).

205. *Id.* at \*11.

206. *Id.*

207. *Id.* at \*12–13.

208. *Id.*

209. *Id.* at \*13–14.

210. *Id.* at \*15–19.

Amendment argument, the court acknowledged “presumptively irreparable” harm to free speech.<sup>211</sup>

Further, the court stated that “the public interest is always served when First Amendment freedoms are protected.”<sup>212</sup> In its conclusion, the court included a moving passage from Justice Brandeis’s opinion in *Olmstead v. United States*, the first wiretap case, which warns of the risk of encroaching on civil liberties.<sup>213</sup>

*D. Silberberg v. Board of Elections (S.D. New York,  
Nov. 3, 2016)*

In New York, a group of three voters unsuccessfully sought to enjoin enforcement of New York’s election laws in *Silberberg v. Board of Elections*.<sup>214</sup> In their complaint, the plaintiffs quoted media, which colloquially referred to ballot selfies as “a thing.”<sup>215</sup>

New York’s Election Law § 17–130(10) states: “[a]ny person who . . . [s]hows his ballot after it is prepared for voting, to any person so as to reveal the contents . . . is guilty of a misdemeanor.”<sup>216</sup> The court traced the law’s historical underpinnings back to the 1890s when political machines, such as Tammany Hall, manipulated elections and perverted the electoral process through fraud, intimidation, bribery, and other methods.<sup>217</sup>

Because the case came up as an emergency call for injunctive and declaratory relief, the court was reluctant to extend a preliminary injunction to the case.<sup>218</sup> Judge Kevin P. Castel called an injunction an “extraordinary and drastic remedy.”<sup>219</sup> To determine whether a preliminary injunction was an appropriate

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211. *Id.* at \*22.

212. *Id.* at \*23.

213. *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”)).

214. *Silberberg v. Bd. of Elections*, 216 F. Supp. 3d 411, 422 (S.D.N.Y. 2016).

215. Complaint for Declaratory and Injunctive Relief at 3, *Silberberg*, 216 F. Supp. 3d 411 (No. 16-CV-08336). Plaintiffs argued that “[e]ach election year, New Yorkers use social media, such as Twitter, Instagram, Facebook, to express their political opinions.” *Id.*

216. N.Y. ELEC. LAW § 17–130(10) (McKinney 2017).

217. *Silberberg*, 216 F. Supp. 3d at 418.

218. *Id.* at 416.

219. *Id.*

remedy, the court had to analyze two questions: (1) the likelihood of success on the merits, and (2) sufficiently serious questions for a balancing inquiry.<sup>220</sup> The alleged harm to the plaintiffs' First Amendment rights was marked by the potential sanctions attached to displaying or disseminating a selfie showing plaintiff's marked and completed ballot.<sup>221</sup> The court rejected plaintiffs' arguments:

This action was commenced 13 days before the presidential election, even though the statute has been on the books longer than anyone has been alive. Selfies and smartphone cameras have been prevalent since 2007. A last-minute, judicially-imposed change in the protocol at 5,300 polling places would be a recipe for delays and a disorderly election, as well-intentioned voters either took the perfectly posed selfie or struggled with their rarely-used smartphone camera. This would not be in the public interest, a hurdle that all preliminary injunctions must cross.<sup>222</sup>

The court eschewed a discussion of strict or intermediate scrutiny, stating that the emergency nature of the case did not require a determination at the preliminary stage.<sup>223</sup> This also affected the court's forum analysis, which was a factor in cases like *Rideout* and *Indiana Civil Liberties Union Foundation*.<sup>224</sup> But the court did find the law to be viewpoint neutral, thus triggering a discussion of "reasonableness."<sup>225</sup> Ensuring fair and free elections in addition to safe and neutral polling places were reasonable justifications for the law, which the court also noted were reasons for voter reform efforts adopted in every state.<sup>226</sup>

By filing the lawsuit at "the eleventh hour," the time element weighed heavily in the court's decision.<sup>227</sup> The court was especially cognizant of the timing, questioning the plaintiffs' logic

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220. *Id.* (citation omitted).

221. *Id.* at 416–17.

222. *Id.* at 415.

223. *Id.* at 418 n.3.

224. *Id.* at 418.

225. *Id.*

226. *Id.* at 418–19.

227. *Id.* at 421–22.

and possible motives for challenging these laws that were first developed in the 1890s as part of the state's election reform measures.<sup>228</sup> While the technology at issue may be relatively novel in a judicial setting, digital photography emerged in the 1990s, and smartphone camera technology exploded in 2007 with the advent of the iPhone.<sup>229</sup> "Yet the plaintiffs did not file this action until October 26, 2016, just thirteen days before a presidential election," the court wrote.<sup>230</sup>

The court feared that ruling on such a well-settled election law could actually jeopardize polling place procedures by creating confusion, distractions, privacy intrusions, and "havoc" on Election Day.<sup>231</sup> Freezing the law could "disrupt" the system.<sup>232</sup> Such "substantial changes" to polling place rules would create an unreasonable burden for local elections officials.<sup>233</sup> The court concluded:

The public's interest in orderly elections outweighs the plaintiffs' interest in taking and posting ballot selfies . . . . While enforcing the challenged law will deny plaintiffs the opportunity to engage in the political speech of sharing photos of completed ballots, they are not prevented from expressing the same political message through other powerful means.<sup>234</sup>

*E. Hill v. Williams (D. Colorado, Nov. 4, 2016)*

In *Hill v. Williams*, a district court judge in Colorado granted an injunction freezing enforcement of provisions of Colorado's election law dealing with ballot selfies.<sup>235</sup> This decision was handed down only days before Election Day, weighing heavily

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228. *Id.* at 420–21.

229. *Id.* at 420.

230. *Id.*

231. *Id.* at 421.

232. *Id.*

233. *Id.*

234. *Id.* at 422.

235. *Hill v. Williams*, No. 16-CV-02625-CMA; No. 16-CV-02649, 2016 U.S. Dist. LEXIS 155460, at \*35–36 (D. Colo. Nov. 4, 2016).



on the irreparable harm and public interest associated with the law.<sup>236</sup>

The court noted the history of the Colorado statute in question—originally drafted in 1891, amended in 1980, and amended again in 2017—and cited to the statute that then read:

[N]o voter shall show his ballot after it is prepared for voting to any person in such a way as to reveal its contents. No voter shall place any mark upon his ballot by means of which it can be identified as the one voted by him, and no other mark shall be placed on the ballot by any person to identify it after it has been prepared for voting.<sup>237</sup>

A violation of section 1-13-712 is classified as a misdemeanor, punishable by a fine of up to \$1,000, up to a year in county jail, or both.<sup>238</sup> In the lead up to the 2016 election, the Denver District Attorney issued a warning to the public under the headline: “Reminder: Ballot Selfies Are Illegal in Colorado.”<sup>239</sup>

The group of six plaintiffs seeking the injunction included a state senator, an official with the Libertarian party, a public defender, and an eighteen-year-old who wanted to document his first vote.<sup>240</sup> At least one plaintiff had been among the hundreds of thousands of mail-in voters in the prior general election, and another plaintiff faced public criticism by being branded a “criminal” after she posted a photograph of her ballot on Facebook.<sup>241</sup> The defendants were state officials including the

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236. *Id.* at \*34–36.

237. COLO. REV. STAT. § 1-13-712(1)(a) (2016); *see also id.* at \*3–6; Amended on March 16, 2017, § 1-13-712(1)(a) now reads “No voter shall place any mark upon his or her ballot by means of which it can be identified as the one voted by him or her, and no other mark shall be placed on the ballot by any person to identify it after it has been prepared for voting.” COLO. REV. STAT. § 1-13-712(1)(a) (2017).

238. COLO. REV. STAT. § 1-13-111.

239. *Hill*, 2016 U.S. Dist. LEXIS 155460, at \*5; Press Release, Mitch Morrissey, Denver Dist. Att’y, Reminder: Ballot Selfies Are Illegal in Colorado (Oct. 20, 2016), [https://web.archive.org/web/20161103043828/https://www.denverda.org/News\\_Release/Releases/2016%20Release/Ballot%20selfies.pdf](https://web.archive.org/web/20161103043828/https://www.denverda.org/News_Release/Releases/2016%20Release/Ballot%20selfies.pdf) (reminding the public that “state law prohibit[s] voters from showing their completed ballot to others . . . [i]nclud[ing] posting [a voters] completed ballot on social media . . . [and noting that] Colorado is one of many states that ban a ballot selfie”).

240. *Hill*, 2016 U.S. Dist. LEXIS 155460, at \*6.

241. *Id.* at \*4–7.

Colorado Secretary of State, the Attorney General, and other law enforcement officials.<sup>242</sup>

After a two-day evidentiary hearing, the district court found the plaintiffs had sufficient standing and faced credible, potential harm to their First Amendment rights at the hands of the government officials named as defendants.<sup>243</sup>

In addition to the state's arguments on standing and mootness, the government argued that an injunction days before the election would harm the electoral system by creating confusion and altering the rules governing the election.<sup>244</sup> The government's principal argument was based on *Purcell v. Gonzalez*, a Supreme Court precedent ruling that a state has a compelling interest in maintaining the integrity of state elections.<sup>245</sup>

In addressing this point the court stated: "This Court heeds the Supreme Court's warning not to disrupt imminent elections by narrowly crafting its injunction and refusing to enjoin the Secretary of State. This Court has no intention of disrupting the upcoming election in Colorado."<sup>246</sup>

The bulk of the court's analysis was devoted to the elements and standards for the preliminary injunction: (1) whether plaintiffs will suffer irreparable harm if the injunction is not granted; (2) the likelihood of success on the merits; (3) whether the threatened injury to plaintiff outweighs damage caused to the opposing party; and (4) whether the injunction would adversely affect public interest.<sup>247</sup>

The court characterized its preliminary injunction as "prohibitive" rather than mandatory, adding that the plaintiffs made a strong showing of probable harm and injury.<sup>248</sup> Further, the court equated the government's action with "chilled" free speech rights when some citizens took down their ballot selfies for fear of prosecution.<sup>249</sup> However, no citizen had been charged with violating the law by posting a selfie.<sup>250</sup>

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242. *Id.* at \*1.

243. *Id.* at \*2-3, \*10-11, \*17-18.

244. *Id.* at \*22.

245. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

246. *Hill*, 2016 U.S. Dist. LEXIS 155460, at \*24.

247. *Id.* at \*25.

248. *Id.* at \*25-26.

249. *Id.* at \*27.

250. *Id.* at \*31.

In its application of intermediate scrutiny, the court balanced the state’s arguments about safeguarding the integrity of the electoral process—eliminating vote buying, intimidation and fraud—against the First Amendment rights of citizens.<sup>251</sup> In deconstructing the statute, the court explained that the criminal law aspects of the statute are problematic because the statute does not have a *mens rea* element to the issue of voter fraud.<sup>252</sup>

On the First Amendment issues, the court wrote:

[T]he harm to Plaintiffs and other Colorado voters—the deprivation of *First Amendment* free speech rights—is presumptively an irreparable harm. The Court finds that there is no harm to the public in precluding enforcement of § 1-13-720. Indeed, the District Attorneys and the Attorney General concede as much when they indicate an intention not to prosecute ordinary violations of the statute.<sup>253</sup>

In its conclusion, the court held that the true public interest in granting the injunction lies with providing clarity for citizens, ensuring their constitutional rights, and allowing them to take photos and post them.<sup>254</sup>

#### IV. DISCUSSION

##### A. Recent Legislative Developments

Since the *Rideout* and Indiana litigation began, at least six states have modified their elections laws to incorporate protections for ballot selfies—California, Hawaii, Nebraska, Oregon, Utah, and Colorado.<sup>255</sup> These modifications indicate that ballot selfies are not only “a thing” as Judge Castel acknowledged in *Silberberg*, but also a valid form of expression worthy of protection. A look at some of the legislative history is also illustrative.

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251. *Id.* at \*29–30.

252. *Id.* at \*30–31.

253. *Id.* at \*34 (citation omitted).

254. *Id.* at \*35.

255. COLO. REV. STAT. § 1-13-712 (2017); *Secrecy of the Ballot and Ballot Selfies*, *supra* note 13.

In September 2016, California's Governor and Secretary of State approved amendments to California's Elections Code by repealing a provision criminalizing the act of a voter showing a completed ballot.<sup>256</sup> "This bill would create an exception to that prohibition that would permit a voter to voluntarily disclose how he or she voted if that voluntary act does not violate any other law," the legislative counsel's digest reports.<sup>257</sup> The new amended law mirrors that language.<sup>258</sup> The law's legislative history references *Rideout* and the Indiana case as well as the long-time governmental purpose behind the state's voter secrecy laws, which date back to 1891.<sup>259</sup> "According to the author, this bill seeks to uphold the First Amendment rights of voters to engage in political speech by allowing voters to voluntarily share their marked ballots," the legislative report states.<sup>260</sup> The analysis also notes that the Secretary of State could not find one example of a voter "ever having been prosecuted" for violating the secret ballot provisions.<sup>261</sup>

Hawaii's recent amendment explicitly allows ballot selfies:

A voter shall not be prohibited from distributing or sharing an electronic or digital image of the voter's own marked ballot via social media or other means regardless of how the voter acquired the image; provided that this section shall not be a defense for any election offenses under chapter 19 or related offenses under the Penal Code.<sup>262</sup>

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256. Assemb. 1494, 2016 Leg., 2015–16 Reg. Sess. (Cal. 2016), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB1494](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1494).

257. *Id.*

258. *Id.* ("A voter may voluntarily disclose how he or she voted if that voluntary act does not violate any other law.")

259. SENATE FLOOR ANALYSIS: THIRD READING, S. AB 1494, 2015–16 Reg. Sess., at 2–3 (Cal. 2016), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB1494](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1494).

260. ASSEMBLY FLOOR ANALYSIS: CONCURRENCE IN SENATE AMENDMENTS, Assemb. AB 1494, 2015–16 Reg. Sess., at 2–3 (Cal. 2016), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB1494](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1494).

261. *Id.*

262. HAW. REV. STAT. § 11-121 (2016).

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In testimony before a house committee, Hawaii’s Chief Election Officer stated that the Office of Elections did not object to the proposed ballot selfie legislation:

[S]o long as the voter does not exhibit their ballot or image of their ballot to other voters in the polling place, disrupt other voters, invade the privacy of other voters, utilize more than a nominal amount of time to take the image, and the voter does not take the image in conjunction with any election offense.<sup>263</sup>

In Nebraska, among lengthy revisions to Nebraska’s elections law was a provision stating: “This subsection does not prohibit a voter from voluntarily photographing his or her ballot after it is marked and revealing such photograph in a manner that allows that photography to be viewed by another person.”<sup>264</sup>

One Senator, testifying before the Government, Military and Veterans Affairs Committee, acknowledged that the ballot selfie issue may “seem comical,” but also stated that affording First Amendment protections to this new form of expression may inspire younger voters to participate in the democratic process.<sup>265</sup> The Senator went on to say that “[s]uch provisions not only protect the fundamental right to express oneself, but also encourages and promotes often younger—but not always just younger—Nebraskans’ excitement about the civic process and encourage others to take part a well.”<sup>266</sup>

Testimony also showed that nobody had been prosecuted for violating the previous provisions against showing marked

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263. *Relating to Elections: Hearing on S. 2242 Before the H. Comm. on the Judiciary*, 28th Leg., Reg. Sess. 1 (Haw. 2016) (statement of Scott T. Nago, Chief Election Officer, Office of Elections), [https://www.capitol.hawaii.gov/session2016/testimony/SB2242\\_SD1\\_TESTIMONY\\_JUD\\_03-29-16\\_.PDF](https://www.capitol.hawaii.gov/session2016/testimony/SB2242_SD1_TESTIMONY_JUD_03-29-16_.PDF).

264. NEB. REV. STAT. § 32-1527(4) (2016).

265. *Hearing on L.B. 787, L.B. 874, L.B. 879 Before the S. Govt., Military, & Veterans Comm.*, 114th Leg., 2d Sess. 2 (Neb. 2016) (statement of Sen. Adam Morfeld), <https://nebraskalegislature.gov/FloorDocs/104/PDF/Transcripts/Government/2016-01-28.pdf>.

266. *Id.* at 2.

ballots and witnesses questioned the propriety of having a criminal law on the books that was not being enforced.<sup>267</sup>

*B. Guiding Protection of the Ballot Selfie*

Although the Supreme Court denied certiorari in *Rideout* and some of the cases litigated on an emergency basis, there is still a need for guidance on the issue. The confluence of issues surrounding the ballot selfie phenomenon raises a number of Constitutional and First Amendment questions. Because election law is governed by each state, there is no requirement for any national standard on this topic.<sup>268</sup> The five decisions, which include opinions from two circuits, provide conflicting guidance and no solid uniformity for whether the ballot selfie is a viable form of protected speech. The conflicting standards among courts are exemplified by the split between the First and Sixth Circuits and the fact that two of the three district court opinions found that the state laws at issue violated the plaintiffs' First Amendment rights. Although the state statutes at issue in the litigation bear some similarities to each other, the nuances among them also make it difficult to find any uniformity. Two of the laws criminalizing showing a completed ballot to another person specifically addressed digital photography and social media. Further, a number of states still have laws either implicitly or expressly addressing ballot selfies and photography at or around polling places.<sup>269</sup>

If these five cases have a common denominator, it is how the legal challenges arose: plaintiffs sought emergency, injunctive, and declaratory relief.<sup>270</sup> The two courts rejecting the ballot selfie challenges complained that time constraints complicated their decision-making.<sup>271</sup> The Sixth Circuit acknowledged that a more reasoned analysis and more comprehensive decision may come

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267. *Id.* at 7–8, 16–17. The Nebraska Secretary of State also objected to the statute. *Id.* at 15–16 (statement of Neil Erickson, Deputy Secretary of State, testifying on behalf of John Gale, Nebraska Secretary of State).

268. With certain constitutional issues, the Supreme Court eschews establishing national standards. *See generally* *Miller v. California*, 413 U.S. 15, 30–32 (1973).

269. *Secrecy of the Ballot and Ballot Selfies*, *supra* note 13.

270. *See supra* Part III.

271. *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016); *Silberberg v. Bd. of Elections*, 216 F. Supp. 3d 411, 420–21 (S.D.N.Y. 2016).

with more time,<sup>272</sup> while the District Court in New York openly complained about the plaintiffs' emergency request.<sup>273</sup> District Court Judge Castel wrote: "Requiring Defendants to make substantial changes to election policies at the eleventh hour is simply unreasonable, particularly given the fact that the plaintiffs could have brought their challenge several months or years ago."<sup>274</sup>

Above and beyond the procedural and equitable issues at play, each court wrestled with the substantive First Amendment question: whether voters have a constitutional right to express themselves through ballot selfies or whether the stated governmental purpose of maintaining the integrity of the electoral system and polling places should outweigh those First Amendment concerns.

Laws governing polling places and the integrity of the electoral process tend to be laws of general applicability and are content-neutral.<sup>275</sup> Of the laws challenged in the five cases, only two explicitly addressed the specific content of digital photography and social media.<sup>276</sup> Thus, when content-neutral laws were challenged, courts mostly applied intermediate scrutiny, requiring the government to prove that there is a legitimate state interest to justify that law.<sup>277</sup> Only the Indiana case applied strict scrutiny, with the court writing:

Thus, it is clear that the statute before us for review is on its face content based, requiring our strict scrutiny in order to determine its conformance with First Amendment principles. Strict scrutiny is required even though the statute's terms do not discriminate based on viewpoint and regardless of

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272. *Crookston*, 841 F.3d at 401.

273. *Silberberg*, 216 F. Supp. 3d at 421.

274. *Id.*

275. *See Crookston*, 841 F.3d at 399–400.

276. *See Rideout v. Gardner*, 838 F.3d 65, 71–72 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017); *Ind. Civil Liberties Union Found., Inc. v. Ind. Sec'y of State*, No. 1:15-CV-01356-SEB-DML, 2015 WL 12030168 182116, at \*2–4 (S.D. Ind. Oct. 19, 2015), *aff'd*, 229 F. Supp. 817 (S.D. Ind. 2017).

277. *Rideout*, 838 F.3d at 72.

whether the General Assembly acted with good intentions when it adopted the law.<sup>278</sup>

The scrutiny question was recently discussed when the Supreme Court reiterated the long-established doctrine of applying strict scrutiny to content-based restrictions in *Reed v. Town of Gilbert*.<sup>279</sup> In rejecting a town's ordinance which required permits for twenty-three categories of signs, the Court applied a two-prong analysis: (1) is the law content neutral on its face or content-based? and (2) can the government justify the law's purpose?<sup>280</sup>

The court wrote:

Our precedents have also recognized a separate and additional category of laws that, though facially content-neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the regulated speech” or that were adopted by the government “because of disagreement with the message [the speech] conveys.” Those laws, like those that are content based on their face, must also satisfy strict scrutiny.<sup>281</sup>

Content-based restrictions that target speech for punishment, sanction, or even censorship must survive strict scrutiny with a compelling government interest and narrow tailoring, while content-neutral restrictions must pass intermediate scrutiny with a significant or important government interest.<sup>282</sup> This heightened level of judicial scrutiny requires the government to prove that the restriction is justified to protect a government interest of the highest order.<sup>283</sup> This requires the government to

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278. *Ind. Civil Liberties Union Found.*, 2015 WL 12030168, at \*4.

279. *See generally* *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2222 (2015).

280. *Id.* at 2228 (“[A] court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.”).

281. *Id.* at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 782–91 (1989)).

282. *Id.* at 2230–31.

283. *Id.* at 2231.



prove that the speech or conduct, left unregulated, will result in actual harm.<sup>284</sup>

With the ballot selfie challenges, regardless of the scrutiny level, the courts had to consider whether the stated purpose of the underlying election laws satisfied a significant (or compelling) governmental interest. One case relied on by most of the courts above is *Burson v. Freeman*, in which the Supreme Court ruled that Tennessee’s law prohibiting solicitation of voters and distribution of campaign materials within 100 feet of a polling place was a content-based restriction because of its effect on political speech.<sup>285</sup> Thus, the law should be viewed under the most “exacting scrutiny.”<sup>286</sup> But, the court wrote, “To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest.”<sup>287</sup> Additional Supreme Court precedent, *Purcell v. Gonzalez*, has stated that states have a compelling interest in maintaining the integrity of the electoral process.<sup>288</sup>

State governments have an indisputable interest in maintaining fair elections free from voter fraud, vote buying and voter intimidation.<sup>289</sup> States have an obligation to ensure that elections are not “rigged.”<sup>290</sup> However, at the trial court level in these cases, no state official presented any shred of evidence that a ballot selfie had been involved in any form of fraud, vote buying, or voter intimidation.<sup>291</sup> Further, in the lead up to the 2016 election after one candidate alleged election rigging, government officials and the media revealed that voter fraud is an almost non-

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284. *Id.*

285. *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

286. *Id.* at 198.

287. *Id.* at 199.

288. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

289. *Id.*

290. Editorial Board, Editorial, *Trump Poses an Unprecedented Threat to the Peaceful Transition of Power*, WASH. POST. (Oct. 17, 2016), [https://www.washingtonpost.com/opinions/trump-poses-an-unprecedented-threat-to-the-peaceful-transition-of-power/2016/10/17/f97f8f82-947f-11e6-bb29-bf2701dbe0a3\\_story.html?utm\\_term=.64a47a167985](https://www.washingtonpost.com/opinions/trump-poses-an-unprecedented-threat-to-the-peaceful-transition-of-power/2016/10/17/f97f8f82-947f-11e6-bb29-bf2701dbe0a3_story.html?utm_term=.64a47a167985) (addressing then-candidate Donald Trump’s allegations that the 2016 presidential election would be rigged if he lost, the newspaper editorial asked: “[w]hat has allowed the United States to last for so long as a democracy, when so many other countries have failed? There are many factors, but none is more fundamental than this: When we hold elections, the losing party acknowledges the legitimacy of the winner, and the winner allows the loser to survive to fight another day”).

291. *See supra* Part III.

existent issue.<sup>292</sup> Legislators and government officials testifying before committees in recent legislation also acknowledged that there was not one shred of evidence of either voter fraud or that a ballot selfie was proffered as proof of vote buying, coercion or other improprieties.<sup>293</sup>

This begs the question: if voter fraud is practically a non-existent issue, how can the ballot selfie even fall under the purview of these laws' stated purpose? Thus, the compelling or significant government interest behind these laws banning ballot selfies is not necessarily linked to a harmful outcome. When no government official can provide evidence that a ballot selfie was proof of any harm or proof of vote buying or other fraud, it raises questions about the application of these laws. The laws at issue prohibit showing a completed ballot to another person, which in effect encompasses ballot selfies.

The harm that state government officials fear with the ballot selfie was characterized by courts as “abstract” and “hypothetical.”<sup>294</sup> In his dissent in *Crookston*, Chief Judge Cole was particularly skeptical that Michigan’s law prevented a viable, provable threat to the electoral process, writing, “When a state infringes upon the freedom of speech of its citizens, it cannot simply assert a government interest in the abstract, it must show that those interests exist and are actually served by the prohibitions imposed by the state.”<sup>295</sup>

### *C. Exit Polling and the First Amendment*

The sanctity of polling places and the First Amendment have also collided in a series of cases involving the press’s right to conduct exit polling. The body of law surrounding the news media’s First Amendment rights to conduct exit polling at and around polling places could offer a glimpse into an accepted rationale and an extension of well-established First Amendment

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292. See generally JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD 6 (The Brennan Center for Justice at the N.Y. Univ. Sch. of Law, 2007), <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

293. See *supra* notes 266–68 and accompanying text.

294. *Rideout v. Gardner*, 838 F.3d 65, 71–73 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017); *Ind. Civil Liberties Union Found., Inc. v. Ind. Sec’y of State*, No. 1:15-CV-01356-SEB-DML, 2015 U.S. Dist. LEXIS 182116, at \*14–15 n.4 (S.D. Ind. Oct. 19, 2015), *aff’d*, 229 F. Supp. 817 (S.D. Ind. 2017).

295. *Crookston v. Johnson*, 841 F.3d 396, 403 (6th Cir. 2016).

protections to the ballot selfie issue. Questions about the media's broadcasting of early voting results during the 1980 presidential election prompted several states to tighten regulations regarding exit polls and the media.<sup>296</sup>

Though media challenges to prohibitions surrounding exit polls—interviewing people near or around polling places after they voted—have continued to percolate in the courts in recent years,<sup>297</sup> perhaps the first appellate decision on the issue still provides resonant insight. The case, *The Daily Herald v. Munro*, reached the Court of Appeals for the Ninth Circuit in both 1984<sup>298</sup> and 1988<sup>299</sup> on media organizations' challenge to a Washington state law banning exit polling within 300 feet of polling places. Both opinions offer direction and guidance on the ballot selfie issue.

Like the ballot selfie cases, the initial challenge to the state statute came through as an emergent declaratory challenge by parties who felt their First Amendment rights would be violated by the statute in question.<sup>300</sup> The district court rejected the constitutional challenge, but the Ninth Circuit held the dismissal was “improvidently” granted.<sup>301</sup> The appellate court found there were genuine issues of material fact that needed to be determined at the lower level, issuing a list of eight questions it wanted answered to clarify whether the statute violated the media's First Amendment rights.<sup>302</sup> Some questions were basic, such as what litigants meant by “exit poll,” but more relevant questions included: did the media presence at or around polling places “discourage *other* persons from casting their ballots?”; and did the statute intend to remedy disruption around polling places “or was its true motive the prevention of the projection and predication of election results prior to the closing of the polls?”<sup>303</sup>

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296. See Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1927–28 (1985).

297. REPS. COMM. FOR FREEDOM PRESS, [https://www.rcfp.org/election\\_legal\\_guide](https://www.rcfp.org/election_legal_guide) (last visited on Feb. 16, 2018).

298. *Daily Herald Co. v. Munro (Munro I)*, 747 F.2d 1252, 1252 (9th Cir. 1984).

299. *Daily Herald Co. v. Munro (Munro II)*, 838 F.2d 380, 380–83 (9th Cir. 1988).

300. *Munro I*, 747 F.2d at 1254.

301. *Id.* at 1252.

302. *Id.* at 1252–53.

303. *Id.*

The appellate court's seventh question aptly summarized the direction for the lower court's analysis, especially with regard to the "under inclusiveness" analysis. The court asked, "Which was the primary purpose of the regulation—disruption of peace, order, and decorum in and around polling places to prevent harassment of potential voters—or suppression of the content of the expression?"<sup>304</sup>

A little over three years later, the Ninth Circuit heard the case again, ruling that the media had a valid First Amendment right to conduct exit polls at polling places.<sup>305</sup> The court addressed the question of whether a polling place or the area surrounding a polling place is a public forum and whether the state has a compelling interest in maintaining conditions at polling places.<sup>306</sup> The court decided that the law was not narrowly tailored, especially when there were other provisions prohibiting disruptive conduct at polling places.<sup>307</sup> Thus, the content-based restriction was deemed unconstitutional.<sup>308</sup> "[A] general interest in insulating voters from outside influences is insufficient to justify speech regulation. Just as with election-day broadcasting or newspaper editorials that may affect voters' choices, regulating the speech here on the basis that it might indirectly affect the voters' choice is impermissible."<sup>309</sup>

A handful of more recent media challenges to exit polling restrictions have found similar content-based regulations unconstitutionally restrictive in New Jersey,<sup>310</sup> Minnesota,<sup>311</sup> and Florida.<sup>312</sup> In *ABC v. Wells*, the district court in New Jersey wrote:

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304. *Id.* at 1253.

305. *Munro II*, 838 F.2d 380, 384 (9th Cir. 1988) ("Exit polling is thus speech that is protected, on several levels, by the First Amendment.")

306. *Id.* at 384–85.

307. *Id.* at 385–86.

308. *Id.* at 387.

309. *Id.*

310. *Am. Broad. Co. v. Wells*, 669 F. Supp. 2d 483, 487 (N.J. Dist. Ct. 2009); *see Munro II*, 838 F.2d at 384 (noting that the freedom to report the news retains great stature in our nation's First Amendment jurisprudence and concluding that "[e]xit polling is thus speech that is protected, on several levels, by the First Amendment"). Additionally, exit-polling is protected speech under the First Amendment, for "[t]he ability to speak on matters of public importance is fundamental to self-government." *CBS, Inc. v. Smith*, 681 F. Supp. 794, 803 (S.D. Fla. 1988).

311. *Am. Broad. Co. v. Ritchie*, No. 08-5285 (MJD/AJB), 2008 U.S. Dist. LEXIS 83909, at \*10–20 (D. Minn. Oct. 15, 2008).

312. *CBS v. Cobb*, 470 F. Supp. 2d 1365, 1370–71 (S.D. Fla. 2006).

[T]o the Court's knowledge every federal court to have addressed exit polling has struck down state efforts restricting the news organizations' rights to conduct exit polls outside of 100 feet. In every case, the impetus by the state is to protect the integrity of the polling place and to prevent election fraud and intimidation to voters. There is no evidence on the record that exit pollsters have ever been engaged in such activity. Even more persuasive is the fact that the exit polling takes place after individuals vote. Voters are not approached entering polling places—and [sic] it is conduct affecting voters on their way to the polls that the government may have an interest in protecting.<sup>313</sup>

Because the exit polling took place after voters engaged in voting, the concerns of disrupting voters or propagating voter fraud seemed somewhat moot.<sup>314</sup> This is another argument that could be applied in the ballot selfie dispute. But the secondary concern about voter intimidation or fraud, both compelling government interests, may remain open for debate in the ballot selfie cases.

#### *D. With More Time; More Analysis*

Much like the initial litigation surrounding media access to polling places, the ballot selfie issues were litigated mostly as emergency challenges. Several of the courts commented on the short turnaround time they faced in deciding cases on emergency and injunctive relief.<sup>315</sup> Some judges wrote that the merits of the underlying issue and the implications on free speech versus governments' arguments of preserving the electoral system would merit a more thorough judicial review outside the confines of an emergency review.<sup>316</sup> Some of the courts seemed less than sympathetic to the plaintiffs' cases and arguments, even intimating

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313. *Wells*, 669 F. Supp. 2d at 488.

314. *Id.* at 489.

315. *See Crookston v. Johnson*, 841 F.3d 396, 399 (6th Cir. 2016).

316. *Id.* at 401.

that the complaints were less-than meritorious.<sup>317</sup> The plaintiffs' motives also came into question.<sup>318</sup>

Thus, it is likely that there may be further challenges to existing statutes in other jurisdictions or remands or rehearing of current cases or appeals in cases already adjudicated.<sup>319</sup> This means courts will need guidance on the issues at hand. As the current cases show, courts will have to balance the free speech rights of litigants against the laws' stated purpose of preserving the electoral system.

As these cases emerge in the future, courts must be cognizant that the ban or criminalization of the ballot selfie is a restraint on First Amendment rights of speech, particularly political speech. Judge Castel minimized the effect on the speaker, writing that despite the ban, voters remain free to opine or express themselves about political issues on social media or other media.<sup>320</sup> While this analysis is accurate, it is also misleading, because it still places restraints on speakers at the hand of government.

A judge or legislature cannot make these determinations without proof that the prohibition on these constitutional rights protects a compelling or legitimate government interest.<sup>321</sup> Thus, regardless of whether courts employ strict or intermediate scrutiny, depending on the language of the statute in question, the governments defending these laws will have to present objective evidence—proof—that the ballot selfie poses a threat to the electoral system.<sup>322</sup> Despite some 2016 campaign rhetoric of vote-rigging, government officials have publicly acknowledged that voter fraud in modern elections is so rare that it barely registers.<sup>323</sup> Furthermore, no government official has provided one iota of evidence that ballot selfies have been a component of any voter

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317. *Id.* at 399 (“A manufactured emergency does not warrant emergency relief”).

318. *Silberberg v. Bd. of Elections*, 216 F. Supp. 3d 411, 415 (S.D.N.Y. 2016).

319. *Crookston*, 841 F.3d at 401 (“Lingering issues remain, some of which may require evidence, including the interrelation of this ban with other Michigan voting procedures, including the use of mail-in ballots. There will be time enough for that after the election. So far, the district court has not held a hearing, and as a result has not made any factual findings.”).

320. *Silberberg*, 216 F. Supp. 3d at 422.

321. *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

322. *Id.* at 199.

323. Danielle Kurtzleben, *5 Reasons (and Then Some) Not to Worry About a 'Rigged' Election*, NAT'L PUB. RADIO (Oct. 18, 2016, 6:00 AM), <https://www.npr.org/2016/10/18/498297287/5-reasons-and-then-some-not-to-worry-about-a-rigged-election>.

fraud or chicanery.<sup>324</sup> Other concerns are equally vague, such as privacy of other voters, distractions, or delays at polling places.<sup>325</sup> The seconds it takes to snap a selfie are hardly time-consuming or distracting.

It is not up to the government to censor, restrain, or limit speech by directing speakers to other fora, essentially saying, “You can’t speak here, but you can go someplace else and yell all you want.” In *Snyder v. Phelps*, Chief Justice Roberts commented on the value of political speech and its important role in public discussions of public issues, regardless of whether it is “refined.”<sup>326</sup>

The ballot selfie may not be the most sophisticated form of political speech, perhaps even lacking the refinement that Chief Justice Roberts addressed in *Snyder*. It is, nonetheless, a modern form of political speech. Judge Lynch, in *Rideout*, recognized this new role and value of the ballot selfie, concluding, “New Hampshire may not impose such a broad restriction on speech by banning ballot selfies in order to combat an unsubstantiated and hypothetical danger. We repeat the old adage: ‘a picture is worth a thousand words.’”<sup>327</sup> Other courts may benefit from Judge Lynch’s rationale.

## V. CONCLUSION

When it comes to politics and our electoral system, there are certainly weightier issues than the ballot selfie. The integrity of the voting process is vital to our democratic system. Voter fraud is a serious issue (yet most likely a nominal concern). Another serious issue is the security of electronic voting—keeping the polls safe and secure from hackers or other outside influences. In addition, voter intimidation and discrimination based on race and ethnicity are still serious concerns that demand government policing by state and federal law enforcement.

The ballot selfie may be the latest social media fad. But it is not going away. There is no documentation on how many voters posted ballot selfies in recent years. The prevalence of the ballot selfie in the cacophony of social media may not ever be quantified.

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324. See generally *id.*

325. *Crookston v. Johnson*, 841 F.3d 396, 400 (6th Cir. 2016).

326. *Snyder v. Phelps*, 562 U.S. 443, 454 (2011).

327. *Gardner v. Rideout*, 838 F.3d 65, 76 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (Apr. 3, 2017).

However, whether ballot selfies are causing harm to the electoral process—as proof of vote buying or other illegal voting activity—has also not been shown, much less proven by government officials.

Prohibitions on electioneering or distribution of campaign materials are legitimate restraints on political speech at or around polling places. But those are more public fora surrounded by special concerns. The voting booth is a private forum. When the voter pulls the curtain or steps into the booth, the voter engages in a private moment to exercise his or her democratic right to vote. If that voter wants to express himself or herself by sharing that private moment with the world via social media, so be it. The First Amendment protects speech, especially political speech, and should, therefore, protect the ballot selfie.