

TAKING SELFIES WITH UNCLE SAM

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I. INTRODUCTION

The right to vote is a fundamental principle in democratic society. To protect this key right, elections in the United States have employed a secret ballot for over one hundred years. Some believe it is time to move beyond the secret ballot and permit voters to show their civic pride by posting “ballot selfies” (photos and videos of marked ballots that are shared on social media). Proponents of ballot selfies imagine a situation such as the following: a young voter is participating in her first election. The stakes in the election are high and the race is close. The voter is proud of her new right and, in a desire to endorse her chosen candidate and encourage her friends and family to vote, she posts a photo of her ballot online.

Others oppose ballot selfies and imagine a different situation for the young voter. This voter depends on a part-time job to support herself while she is in school. The day before the election, the voter’s boss informs her that the company she works for has “certain beliefs” that only one of the candidates represents. The boss tells the young woman that he and the rest of the staff think it would be a great idea to post photos of their ballots on the company’s Facebook page. Caught between the desire to vote for her preferred candidate and the need to please her boss to maintain her job the young voter succumbs her boss’s demand.

The two stories illustrate the difficult situation courts face when determining the constitutionality of laws that ban ballot selfies. Ballot selfie prohibitions call on courts to weigh the right to engage in political speech against the right to vote for the candidate of one’s choice.

This comment explores the dilemma and argues that ballot selfie bans are a constitutional means of protecting the right to vote. Part II.A examines the history of the secret ballot. Part II.B lays out the free speech doctrine and discusses how *Reed v. Town of Gilbert* clarified an ambiguity in this doctrine. Next, Part II.C describes five cases that reviewed ballot selfie prohibitions. Part III argues that laws specifically targeting ballot selfies should be subject to strict scrutiny and, even under this high standard, the laws are constitutional. Finally, Part IV maintains that laws that prohibit ballot exposure, such as a law forbidding photography and videography in the polling place, are

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subject to the reasonableness standard under the public forum doctrine and are thus more clearly constitutional.

II. BACKGROUND

A. The History of the Secret Ballot

In the early nineteenth century, American politics were organized on an informal basis because society was mostly rural and citizens within the same community knew one another.¹ Early elections were *vive voce*,² or by voice.³ The printed ballot system was first introduced in 1829⁴ and became widespread by the mid-nineteenth century.⁵ At this time, political parties supplied the ballots; each party's ballot was a different size, shape, and color.⁶ As a result, it was easy to verify whom one voted for, so vote buying was common.⁷ Citizens were frequently given favors, money, or a shot of whiskey in exchange for their vote.⁸ Yet, since communities were small and tightknit, vote buying in the early nineteenth century was not merely bribery but part of a complex social transaction:⁹

[These exchanges] were frequently embedded in long-term personal relationships between party agents and the men who voted [T]he men who were given things had become Democrats precisely because they had come to expect to be given things by Democratic agents at the polls. Such men were not so much bribed as rewarded for their votes.¹⁰

However, with the Industrial Revolution and the rapid expansion of urban areas, American society became less personal and outright vote

1. Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 BRIT. J. POL. SCI. 1, 10 (2000).

2. Tracy Campbell, *Machine Politics, Policy Corruption, and the Persistence of Voter Fraud: The Case of the Louisville, Kentucky, Election of 1905*, 15 J. POL. HIST. 269, 271 (2003).

3. Ware, *supra* note 1, at 11.

4. Michael McGrath, *Election Reform and Voter Turnout: A Review of History*, 10 NAT. CIV. REV. 38, 39 (2012), <http://onlinelibrary.wiley.com/doi/10.1002/ncr.21086/abstract>.

5. Ware, *supra* note 1, at 11.

6. *E.g.*, ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 115 (2000).

7. *E.g.*, *id.* at 115.

8. Richard Bensel, *The American Ballot Box: Law, Identity, and the Polling Place in the Mid-Nineteenth Century*, 17 STUD. AM. POL. DEV. 1, 14 (2003).

9. *Id.* at 24.

10. *Id.*

buying and voter coercion increased.¹¹ Large urban settings enabled parties to abuse the ballot system because a voter no longer had a relationship with the person who gave him his ballot.¹² Illiteracy was high, so a party member could easily trick a citizen into voting for a party he did not support by giving the voter a ballot in the size, shape, and color of the party he supported, but with the names of candidates he did not support.¹³

Further, the public nature of the polling places facilitated intimidation.¹⁴ Government buildings were rare so most elections were held in privately owned structures.¹⁵ Liquor establishments (e.g., pubs and bars) were one of the most common polling places.¹⁶ Consequently, “the street or square outside the voting window frequently became a kind of alcoholic festival in which many men were clearly and spectacularly drunk.”¹⁷ Members of the crowd often insulted voters of the opposite party and these insults quickly escalated into physical conflicts.¹⁸ In large cities, political parties deployed gangs to watch the polls in neighborhoods that were dominated by their party.¹⁹ A vote for the wrong party resulted in violence.²⁰

Moreover, the decentralized government structures of the nineteenth century facilitated voter fraud.²¹ Government power was widely distributed due to the large number of elected officials.²² Some city councils had dozens or even hundreds of elected members.²³ Additionally, mayoral power was weak and cities had numerous elected department heads and other executive officers.²⁴ Therefore, the real political power was in party bosses who gained support by handing out jobs and favors.²⁵ What is more, the overabundance of elected offices made it difficult for voters to be informed.²⁶ Party bosses offered a

11. Ware, *supra* note 1, at 10.

12. *See id.* at 11.

13. *Id.*

14. *Id.*

15. Bensel, *supra* note 8, at 6.

16. *Id.*

17. *Id.* at 12.

18. *Id.*

19. Fabrice Lehoucq, *When Does a Market for Votes Emerge?*, in *ELECTIONS FOR SALE: THE CAUSES AND CONSEQUENCES OF VOTE BUYING* 38 (Frederic Charles Schaffer ed., 2007).

20. *Id.*

21. McGrath, *supra* note 4, at 39.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

simple solution: vote along party lines.²⁷

Voter fraud and coercion were not unique to the U.S.; democracies around the world struggled with similar election issues. In an effort to remedy these problems, the Australian government introduced what became known as the Australian ballot in 1856.²⁸ The Australian ballot was a standard ballot printed by the government that contained the names of all the candidates running for office.²⁹ The voter, usually in private, marked the names of the candidates he wished to vote for and handed his marked ballot to the election official.³⁰ Unlike party ballots, the Australian ballot was uniform in size, shape, and color and could be given to an election official without revealing the content of the ballot.³¹ By the 1880s, Australia, Britain, Belgium, Luxembourg, and Italy all used the Australian ballot.³² Louisville and Massachusetts were the first governments in the U.S. to adopt the Australian ballot in 1888.³³ By 1896, thirty-nine states had adopted the Australian ballot.³⁴

Yet, while the Australian ballot was a significant step toward fairer elections, it did not end voter fraud.³⁵ The Australian ballot protected against undue influence on a voter's public selection of a candidate but it did not protect against all forms of corruption.³⁶ Party machines continued to circumvent voting laws well into the twentieth century,³⁷ employing "new methods . . . to achieve the same results."³⁸ In its new form, voter coercion involved party members looking over voters' shoulders,³⁹ police intimidation, moving voting precincts on election day to decrease voter turnout, falsely registering voters, replacing election officials with party members, stuffing ballot boxes,⁴⁰ and the Tasmanian dodge.⁴¹

Slowly, voter fraud diminished as changes in city governments

27. McGrath, *supra* note 4, at 39.

28. *E.g.*, KEYSSAR, *supra* note 6, at 115.

29. *E.g.*, *id.*

30. *Id.*

31. Ware, *supra* note 1, at 8–9.

32. *E.g.*, *id.* at 8.

33. *Id.* at 9.

34. McGrath, *supra* note 4, at 39.

35. *E.g.*, Campbell, *supra* note 2, at 273.

36. *Id.* at 291.

37. Lehoucq, *supra* note 19, at 38.

38. Campbell, *supra* note 2, at 291.

39. Lehoucq, *supra* note 19, at 38.

40. Campbell, *supra* note 2, at 283.

41. In a practice known as the Tasmanian dodge, a voter would illegally take a ballot from the polling place, give it to a party member who would mark the ballot and give it to the next voter who would then cast the ballot and return with another empty ballot for the party member to fill out and give to another voter; the process would continue throughout the voting hours. Ware, *supra* note 1, at 8.

disempowered party bosses and reduced corruption.⁴² These changes included centralizing administrative offices, implementing civil service rules, reducing the number of elected positions, enacting nonpartisan elections, and professionalizing management structures.⁴³ Governments also adopted levered and later punch card voter machines to further eliminate fraudulent voting.⁴⁴

Today, discussions of vote buying and voter coercion largely center on partisan debates.⁴⁵ Republicans advocate strict voting regulations to decrease voter fraud.⁴⁶ Conversely, Democrats argue that voter fraud is no longer an issue and Republicans only allege voter fraud to decrease Democratic voter turnout.⁴⁷ According to political scientist Lorraine Minnite, many of the recent supposed instances of voter fraud have alternative explanations such as erroneous news reports, mismanaged registration systems, sloppy record keeping, voter error, failed efforts to match names on different lists, clerical errors by election officials, and dissatisfied losing candidates.⁴⁸

The ballot-selfie issue is a radical departure from recent debates on voter fraud. Rather than turning on partisan assertions, the validity of ballot selfies is a question of constitutional interpretation. Those in favor of ballot selfies argue that ballot selfies are protected political speech. To assess these arguments one must first understand the free speech doctrine and recent developments in this area of law.

B. The Free Speech Doctrine

To determine if a law violates the First Amendment, the court must decide whether the law is content based or content neutral.⁴⁹ If the law distinguishes based on the subject of the speech or the speaker's viewpoint, the law is held to strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."⁵⁰ Narrowly tailored, in the context of strict scrutiny, means that the law is the "least intrusive means" of achieving the compelling state interest.⁵¹

42. McGrath, *supra* note 4, at 40.

43. *Id.*

44. *Id.*

45. *E.g.*, KEYSSAR, *supra* note 6, at 279–83; LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 6 (2010).

46. *E.g.*, KEYSSAR, *supra* note 6, at 279–83; MINNITE, *supra* note 45, at 6.

47. *Id.*

48. KEYSSAR, *supra* note 6, at 282.

49. *E.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

50. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011).

51. Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989).

Conversely, if the law does not distinguish based on subject matter, the law is content neutral.⁵² A content-neutral regulation is subject to intermediate scrutiny, which requires the law to be “narrowly tailored to serve a significant governmental interest.”⁵³ The narrowly tailored requirement of intermediate scrutiny is less rigorous than the parallel requirement of strict scrutiny. In the context of intermediate scrutiny, narrowly tailored only requires a “close fit between the ends and means”⁵⁴ and demands that the law leave open ample alternative channels of communication.⁵⁵ Unlike content-based regulations, content-neutral laws “need not be the least restrictive or least intrusive means of serving the government’s interests.”⁵⁶

In addition to strict and intermediate scrutiny, the Court has established a number of alternative free speech doctrines for certain kinds of speech regulations. The secondary effects test holds that speech laws that guard against unwarranted secondary effects are constitutional.⁵⁷ The secondary effects test is a narrow doctrine that only applies to laws regulating controversial social issues, such as adult theatres and abortion clinics.⁵⁸

The commercial speech doctrine holds speech that “does no more than propose a commercial transaction” to a lower level of constitutional protection.⁵⁹ Commercial speech is protected under the First Amendment when: (1) the speech deals with a lawful activity and is not misleading; (2) the government interest is substantial; (3) the speech directly advances the government interest; and (4) the speech is not more extensive than necessary to achieve the government interest.⁶⁰

52. DAVID L. HUDSON, LEGAL ALMANAC SERIES: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2.2 (2012).

53. *Ward*, 491 U.S. at 804.

54. *McCullen v. Coakley*, 134 S. Ct. 2518, 2533 (2014).

55. Brian J. Connolly & Alan C. Weinstein, *Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 607 (2015).

56. *McCullen*, 134 S. Ct. at 2535. For example, an ordinance prohibiting political radio advertisements would be content based, because it distinguished based on the content of the advertisement, and subject to strict scrutiny. An ordinance that forbid all radio advertisements, on the other hand, would be content neutral and subject to intermediate scrutiny. The reason for this disparate treatment is that the Supreme Court finds that it is fairer to have a total ban – via a content-neutral law – than to allow some ideas to be shared and not others – via a content-based law. *E.g.*, HUDSON, *supra* note 52, § 2:2.

57. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50–53 (1986).

58. *See id.* (finding that the city’s adult theatre zoning ordinance was constitutional because the ordinance guarded against the unwarranted effects of adult theatres on surrounding communities); *see also McCullen*, 134 S. Ct. at 253–55 (Scalia, J., concurring) (pointing out that the Court’s reasoning in upholding the abortion clinic zoning law mirrored the secondary effects test).

59. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1972) (internal quotation marks omitted).

60. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566

Last, the public forum doctrine distinguishes based on where the speech takes place and separates government property into three categories: traditional public forums, limited public forums, and nonpublic forums.⁶¹ First, traditional public forums include places open for public enjoyment such as streets and parks.⁶² Content-based restrictions on speech in traditional public forums are subject to strict scrutiny.⁶³ Second, limited public forums are “public property which the state has opened for use by the public as a place for expressive activity.”⁶⁴ Speech regulations in limited public forums are subject to the same level of review as regulations in traditional public forums.⁶⁵ Third, nonpublic forums are government properties that are not broadly open for public use, such as schools and military bases.⁶⁶ Laws regulating speech in nonpublic forums are not subject to strict or intermediate scrutiny.⁶⁷ Instead, the “only requirement of the regulation is that it be reasonable and not an effort to suppress a speaker because of a disagreement with that person’s views.”⁶⁸

C. *Reed’s Constitutional Standard*

1. Pre-*Reed* Circuit Split

Before *Reed*,⁶⁹ Supreme Court jurisprudence was unclear as to whether content-based distinctions that were enacted with benign government intentions were subject to strict or intermediate scrutiny.⁷⁰ Beginning in the 1970s, the Court developed two lines of cases regarding content neutrality.⁷¹ Many of the Court’s decisions followed the “strict approach,” which found that subject matter distinctions were content based regardless of the government’s intent.⁷² But, occasionally the Court embraced the “functional approach,” which held that subject

(1980).

61. *E.g.*, *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

62. *Id.* at 45.

63. *Id.*

64. *Id.*

65. *Id.* at 46.

66. HUDSON, *supra* note 52, § 2:11.

67. *See Longo v. U.S. Postal Serv.*, 983 F.2d 9, 12 (2d Cir. 1992).

68. *Id.*

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

70. *Connolly & Weinstein*, *supra* note 55, at 575–76.

71. *Id.* at 576.

72. *See Police Dep’t of Chi. v. Mosley*, 408 U.S. 92 (1972); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *see also Connolly & Weinstein*, *supra* note 55, at 576.

matter distinctions were content neutral if they were justified without reference to the content of the speech.⁷³ These inconsistent rulings resulted in a circuit split⁷⁴ in which the Third, Fourth, Sixth, and Seventh Circuits adopted the “functional approach”⁷⁵ and the Eight and Eleventh Circuits followed the “strict approach.”⁷⁶

2. *Reed v. Town of Gilbert*

The Supreme Court granted certiorari in *Reed* to resolve this long-standing circuit split.⁷⁷ In *Reed*, the Court was asked to review the constitutionality of Gilbert, Arizona’s sign code (Code), which prohibited the display of outdoor signs without a permit with twenty-three exceptions, all subject to different regulations.⁷⁸ “Temporary directional signs” (signs that directed the public to a church or other “qualifying event”)⁷⁹ had strict regulations; the signs could be no larger than six square feet, no more than four signs could be placed on a single property at one time, the signs could not be displayed more than twelve hours before the qualifying event, and the signs had to be taken down within an hour of the event.⁸⁰

The Good News Community Church (Church) had Sunday services at various temporary locations throughout the area.⁸¹ To direct members to its services, the Church posted signs early every Saturday with the Church’s name and the time and location of the next service.⁸² The Church did not remove the signs until midday Sunday.⁸³ Gilbert cited the Church for failing to include the event date on the signs and for exceeding the time limits for “temporary directional signs.”⁸⁴ Unable to resolve the issue, the Church brought action alleging that the Code abridged the Church’s freedom of speech in violation of the First and Fourteenth Amendments.⁸⁵

When *Reed* reached the Ninth Circuit the court adopted the functional

73. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); see also Connolly & Weinstein, *supra* note 55, at 576–77.

74. Connolly & Weinstein, *supra* note 55, at 574; Ashutosh Bhagwat, *Reed v. Town of Gilbert: Signs of (Dis)content?*, 9 N.Y.U. J.L. & LIBERTY 137, 140 (2105).

75. Connolly & Weinstein, *supra* note 55, at 576–77.

76. *Id.* at 576.

77. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

78. *Id.* at 2224.

79. *Id.* at 2225 (quoting GILBERT, ARIZ., LAND DEVELOPMENT CODE, Ch. 1, § 4.402 (2005)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Reed*, 135 S. Ct. at 2225.

84. *Id.*

85. *Id.* at 2226.

approach. The Ninth Circuit reasoned that the Code was content neutral because the town's "interests in regulat[ing] temporary signs [were] unrelated to the content of the sign."⁸⁶ As a result, the Code was subject to intermediate scrutiny, which it satisfied.⁸⁷

The Supreme Court reversed the Ninth Circuit's decision and adopted the strict approach.⁸⁸ Writing for the majority, Justice Thomas laid out a three-part test to determine whether a law is content based or content neutral.⁸⁹ First, a court must determine if the law is facially content neutral and neutral in purpose.⁹⁰ The Court made clear that both viewpoint and subject matter distinctions are facially content based.⁹¹

Second, if the law is facially content neutral and neutral in purpose, the court must determine the government's purpose in passing the law.⁹² If the law was enacted to favor some speech over others, it is content based.⁹³ The majority explained that a court must determine the government's intention in enacting seemingly content-neutral laws because a legislature can write a law in a content-neutral way while its true, underlying motive is to suppress speech.⁹⁴ Third, if the law is content based, it is subject to strict scrutiny.

Applying the three-part test, the Supreme Court held that, first, the Code was facially content based because the Code discriminated based on the subject of the sign.⁹⁵ Second, since the Code was facially content based, the Court did not need to inquire as to Gilbert's intention in passing the Code.⁹⁶ Third, the Code was subject to strict scrutiny because it was content based.⁹⁷ The Court concluded that the Code failed strict scrutiny because, even though the town may have compelling interests in preserving its aesthetic appeal and traffic safety, the Code was not narrowly tailored to meet those interests.⁹⁸

In her concurrence, Justice Kagan argued that the majority went too far in declaring that all subject matter restrictions are subject to strict scrutiny.⁹⁹ Justice Kagan pointed out that in previous decisions the

86. *Id.*

87. *Id.*

88. *Id.*

89. *Reed*, 135 S. Ct. at 2227.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Reed*, 135 S. Ct. at 2227.

96. *Id.* at 2228.

97. *Id.* at 2231.

98. *Id.*

99. *Id.* at 2238. Justice Breyer, in his separate concurrence, agreed. *Id.* at 2234.

Court sometimes applied intermediate scrutiny to subject matter distinctions.¹⁰⁰ Embracing the functional approach, Justice Kagan reasoned that strict scrutiny is unwarranted when the law does not have the intention or effect of skewing the public debate.¹⁰¹

3. The Emerging Trend in Lower Courts

Since *Reed* was decided in June 2015, many lower courts, uncomfortable with *Reed*'s strict approach, have attempted to avoid *Reed*. Before *Reed*, many lower courts followed the functionalist approach because they were uncomfortable with the harsh repercussions of holding all subject matter distinctions to strict scrutiny.¹⁰² Today, lower courts can no longer cherry pick what line of Supreme Court cases they wish to follow because *Reed* makes clear that all subject matter distinctions are subject to strict scrutiny regardless of the government's intention. Instead, lower courts that wish to avoid the strict approach use less stringent free speech doctrines—namely the secondary effects test and the commercial speech doctrine—to circumvent *Reed*.¹⁰³ In his concurrence in *Reed*, Justice Breyer foresaw this result and warned that the alternative free speech doctrines would not be sufficient to escape strict scrutiny.¹⁰⁴ Justice Breyer worried that the lower courts would water down strict scrutiny to avoid *Reed*'s severe results, which he cautioned would “weaken the First Amendment’s protection in instances where ‘strict scrutiny’ should apply in full force.”¹⁰⁵ However, because lower courts recognize the importance of protecting strict scrutiny, the courts have instead expanded the secondary effects test and commercial speech doctrine.¹⁰⁶

As stated, previously the secondary effects test only applied to cases dealing with zoning ordinances of controversial social issues. After *Reed*, the Western District of Texas expanded the secondary effects doctrine to include national security concerns in an effort to evade *Reed*.¹⁰⁷

100. *Id.* at 2238 (citing *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007)); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 792 (1984); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

101. *See Reed*, 135 S. Ct. at 2238.

102. *See Bhagwat, supra* note 74, at 144.

103. *E.g.*, Urja Mittal, *The “Supreme Board of Sign Review”: Reed and Its Aftermath*, 125 *YALE L. J. F.* 359, 365–66 (2016); *see also* Matthew Hector, *Groundbreaking Supreme Court Opinion Dooms Panhandling Law*, 103 *ILL. B.J.* 15 (2015).

104. *Reed*, 135 S. Ct. at 2235.

105. *Id.*

106. Mittal, *supra* note 103, at 365–66.

107. *Id.* at 366; *see* *Def. Distributed v. U.S. Dep’t of State*, 121 F.Supp.3d 680 (W.D. Tex 2015)

Similarly, some lower courts have expanded the commercial speech doctrine.¹⁰⁸ In *Contest Promotions v. City & County of San Francisco*, the Northern District of California was asked to review San Francisco's sign code, which permitted on-site signs (signs that related to the business on which the signs were located) and banned off-site signs.¹⁰⁹ Rather than focusing on the code's subject matter distinction, the court decided that since on-site signs directed potential customers to a business the signs constituted commercial speech.¹¹⁰ The court, in turn, applied the less rigorous commercial speech doctrine and upheld the sign code.¹¹¹ The Western District of Tennessee, examining a nearly identical sign code, applied *Reed's* strict approach and struck down the code.¹¹²

D. Ballot Selfie Cases

Ballot selfie cases also manifest the above-described deviating application of the *Reed* standard. When determining the constitutionality of ballot selfie bans some courts followed *Reed's* strict approach and other courts employed alternative free speech doctrines. The forgoing section discusses four cases reviewing ballot selfie prohibitions. First, in *Rideout v. Gardner*, the New Hampshire district court reviewed section 659:35 of the New Hampshire Code, which targeted ballot selfies. The court applied *Reed's* three-part test and found that the law was subject to strict scrutiny. According to the court, the law did not withstand this rigorous standard. Likewise, in *Indiana Civil Liberties Union Foundation Inc. v. Indiana Secretary of State*, the Southern District of Indiana applied *Reed's* three-part test and found that Indiana Code section 3-11-8-17.5, which targeted ballot selfies, was subject to strict scrutiny and that it did not withstand this standard. Second, in *Crookston v. Johnson*, the Sixth Circuit applied the secondary effects test and denied a motion to stay Michigan Compiled Laws section 168.738(2), which prohibited ballot exposure. Third, when the First Circuit reviewed *Rideout*, the court disregarded *Reed's*

(holding that the International Traffic in Arms Regulation, which regulated the disclosure of “technical data” relating to “defense articles,” was content neutral because it was “intended to satisfy a number of foreign policy, and national defense goals”).

108. *E.g.*, Mittal, *supra* note 103, at 367; *see also* Hector, *supra* note 103.

109. *Contest Promotions, LLC v. City & Cnty. of San Francisco*, 100 F.Supp.3d 835, 839 (N.D. Cal. 2015).

110. *Id.* at 842–44.

111. *Id.*

112. *See* *Thomas v. Schroer*, 116 F.Supp.3d 869 (W.D. Tenn. 2015) (finding that the sign code was content based because the only way to distinguish between an on-site and off-site sign was to read the sign and determine if it was sufficiently related to the business on which it was located).

three-part test and struck down section 659:35 of the New Hampshire Code using intermediate scrutiny. Last, in *Silberberg v. Board of Elections of New York*, the New York district court employed the public forum doctrine and upheld New York Election Law section 17-130(10), which banned ballot exposure.

1. Strict Scrutiny

Since 1891, New Hampshire law has prohibited voters from showing their marked ballots.¹¹³ In 2014, the legislature amended section 659:35 to better account for technological advances by specifically banning ballot selfies.¹¹⁴ The amended law stated:

No voter shall allow his or her ballot to be seen by any person 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.¹¹⁵

After the amendment took effect, the Attorney General investigated plaintiffs Leon Rideout, Andrew Langlois, and Brandon Ross for posting ballot selfies on social media.¹¹⁶ The three men, represented by the American Civil Liberties Union (ACLU), brought action against the state.¹¹⁷ They requested declarations that section 659:35 was facially unconstitutional and unconstitutional as applied and an injunction to prohibit the state from enforcing the law.¹¹⁸

The district court applied *Reed*'s three-part test. First, the court determined that section 659:35 was facially content based because it discriminated based on subject matter; the Attorney General had to know the content of the photo to determine if the photo violated the law.¹¹⁹ Second, since the law was facially content based, the court did

113. *Rideout v. Gardner*, 838 F.3d 65, 69 (2d Cir. 2016) [hereinafter *Rideout 2d Cir.*].

114. *Id.*

115. N.H. REV. STAT. ANN. § 659:35, I (Supp. 2014).

116. Leon Rideout was threatened with prosecution after he posted a photo on Twitter that showed he voted for himself and other Republican candidates in the 2014 primary election. Similarly, Andrew Langlois was investigated after he posted a photo on Facebook of his ballot along with the text explaining, "Because all of the candidates SUCK, I did a write-in of Akira [his recently deceased dog]." When Brandon Ross learned that section 659:35 was being actively enforced, he posted a photo on Facebook of his ballot that showed he voted for himself in the New Hampshire House of Representatives race with the text, "Come at me, bro." *Rideout v. Gardner*, 123 F.Supp.3d 218, 226–27 (D.N.H. 2015) [hereinafter *Rideout D.N.H.*].

117. *Rideout 2d Cir.*, 838 F.3d at 68.

118. *Id.* at 70.

119. *Rideout D.N.H.*, 123 F.Supp.3d at 229.

not need to inquire into the government's intention in passing the law.¹²⁰

Third, because section 659:35 was facially content based, it was subject to strict scrutiny.¹²¹ The court explained that, to prove a compelling state interest, a state must demonstrate an "actual problem" exists.¹²² Upon examining the history of the Australian ballot, the court conceded that vote buying and voter coercion were significant problems in the past.¹²³ Yet, because the state did not produce sufficient evidence of voter fraud in the last one hundred years, the state failed to prove a compelling interest in preventing voter fraud.¹²⁴ Finally, the court declared that even if the state had a compelling interest, section 659:35 was not narrowly tailored. The law was "vastly overinclusive" because it would "for the most part, punish only the innocent while leaving actual participants in vote-buying and voter-coercion schemes unscathed."¹²⁵ Since section 659:35 failed strict scrutiny, the court concluded that the law was unconstitutional on its face.¹²⁶

In *Indiana Civil Liberties Union*, the Southern District of Indiana similarly applied *Reed's* three-part test and struck down Indiana Code section 3-11-8-17.5, which, like section 659:35 of the New Hampshire Code, specifically targeted ballot selfies.¹²⁷ First, the court found that the law was facially content based because it discriminated based on subject matter.¹²⁸ Similar to section 659:35, to determine if a voter violated section 3-11-8-17.5 the Attorney General had to know not only that a photo was taken in the polling place, but also that the photo contained the image of a ballot.¹²⁹ Second, the court rejected the state's arguments that section 3-11-8-17.5 was content neutral because the legislature did not enact it to favor one idea over another.¹³⁰

Third, the district court applied strict scrutiny. The court

120. *Id.*

121. *Id.* at 231–34.

122. *Id.* at 231–32.

123. *Id.* at 224–26.

124. The court pointed out that smart phones and social media have been around for many years and reasoned that if the technology was creating an avenue for voter fraud, the state should be able to produce evidence of this. *Id.* at 232.

125. *Id.* at 234.

126. *Id.* at 236.

127. *Ind. Civil Liberties Union Found. Inc. v. Ind. Sec'y of State*, No. 1:15-cv-01356-SEB-DML, 2015 WL 12030168 (S.D. Ind. Oct. 19, 2015).

128. *Id.* at *3.

129. Further, the court held that the law discriminated based on purpose for photos taken to document or report a problem with a voting system were permitted while photos taken to post on social media were not. *Id.*

130. Citing *Reed*, the court stated that "[i]f the law is determined to be content based on its face, it is subject to strict scrutiny regardless of whether it was enacted with good intentions." *Id.* (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015)).

acknowledged that maintaining the integrity of the voting process and the secrecy of the vote are compelling interests in the abstract.¹³¹ But, the court found that the state failed to prove a compelling interest in the case at hand.¹³² Like *Rideout*, the state failed to produce enough evidence of voter fraud to prove an “actual problem” existed.¹³³ In so finding, the court held that section 3-11-8-17.5 was not narrowly tailored.¹³⁴ The law was overinclusive as it prohibited photos of unmarked ballots and photos taken to show civil pride.¹³⁵

2. The Secondary Effects Test

The Sixth Circuit applied the secondary effects test and denied a motion to stay Michigan Compiled Laws section 168.738(2), which prohibited ballot exposure and provides:

If an elector shows his or her ballot . . . to any person other than a person lawfully assisting him or her . . . or a minor child . . . after the ballot has been marked . . . the ballot shall not be deposited in the ballot box . . . and the elector shall not be allowed to vote at the election.¹³⁶

While the Sixth Circuit did not decide the case on the merits, the court expressed skepticism of Crookston’s likelihood of success on the merits when determining whether to grant the preliminary injunction.¹³⁷ Without any elaboration, the court stated that the Michigan law “seems to be content-neutral” citing *Connection Distributing Co. v. Holder*.¹³⁸ In *Connection Distributing Co.*, the Supreme Court reviewed section 7513(a) of the Protection and Obscenity Enforcement Act (POEA),

131. *Ind. Civil Liberties*, 2015 WL 12030168, at *4.

132. *Id.*

133. *Id.*

134. *Id.* at *5.

135. *Id.* at *6.

136. MICH. COMP. LAWS § 168.738(2) (1996). In denying the motion, the Sixth Circuit stressed that “[t]iming is everything.” The court explained that Michigan had banned ballot exposure since 1891. In 1996, the state enacted the present form of section 168.738(2). Crookston violated this law in November 2012 when he posted a picture of his ballot for the Michigan State University Trustee election on Facebook. However, Crookston brought action nearly four years later, with the 2016 presidential election looming, and offered no reasonable explanation for the delay. *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016). The Sixth Circuit held that when an election is imminent and there is no time to resolve the factual disputes the court will not grant an injunction to alter the state’s established election procedures “absent a powerful reason for doing so.” *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006)). According to the court, Crookston’s “manufactured emergency does not warrant emergency relief.” *Id.* at 399.

137. *Crookston*, 841 F.3d at 399.

138. *Id.*

which required people who create pornography to maintain recorders of their model's ages and identities to prevent child exploitation.¹³⁹ The Court found that section 7513(a) was content neutral under the secondary effects test¹⁴⁰ and reasoned that “[s]o long . . . as the law addresses the collateral or ‘secondary effects’ of the expression, not the effect the expression itself will have on others, it will be treated as content neutral.”¹⁴¹ After citing *Connection Distributing Co.*, the Sixth Circuit stated that even if section 168.738(2) is content based the Supreme Court has upheld content-based polling laws.¹⁴²

Further, the Sixth Circuit found that the state might be able to prove actual harm. The court pointed to three decisions in the Sixth Circuit in the past three years that dealt with voter fraud¹⁴³ and maintained that “[t]he links between these problems and the prohibition on ballot exposure are not some historical accident; they are ‘common sense.’”¹⁴⁴ The Sixth Circuit rejected Crookston's argument that the state could not prove an actual harm by citing *Burson v. Freeman*. In *Burson*, the Supreme Court examined whether forbidding electioneering within one hundred feet of the polling place violated the Frist Amendment.¹⁴⁵ The Court found that the state's asserted compelling interests in the right to vote for the candidate of one's choice and maintaining the integrity of the electoral process were “obviously” compelling because both rights went to the essence of democracy.¹⁴⁶ Upon examining the history of the Australian ballot, the Court concluded that the historical evidence alone demonstrated an actual harm.¹⁴⁷ The state did not need to provide recent evidence of voter fraud to prove a compelling state interest because the Court recognized that the “long, uninterrupted, and prevalent” use of similar statutes throughout the U.S. made it difficult for the state to prove what would happen in the absence of the statutes.¹⁴⁸ Applying *Burson*, the Sixth Circuit reasoned that Michigan's long history of ballot-exposure prohibitions made it nearly impossible for the state to know what would happen without the laws.¹⁴⁹

139. *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 325 (6th Cir. 2009) (en banc).

140. *Id.* at 328.

141. *Id.*

142. *Crookston*, 841 F.3d at 400 (citing *Burson v. Freeman*, 504 U.S. 191 (1992)).

143. *Id.* (citing *United States v. Robinson*, 813 F.3d 251, 254 (6th Cir. 2016) (affirming a vote-buying conviction); *United States v. Turner*, 536 F. App'x 614, 615 (6th Cir. 2013) (also affirming a vote-buying conviction); *United States v. Young*, 516 F. App'x 599, 600 (6th Cir. 2013) (same)).

144. *Crookston*, 841 F.3d at 400 (quoting *Burson*, 504 U.S. at 207)

145. *Burson* 504 U.S. at 193.

146. *Id.* at 199.

147. *Id.* at 200–06.

148. *Id.* at 208.

149. *Crookston*, 841 F.3d at 400. The Sixth Circuit also found that ballot selfies could cause

3. Intermediate Scrutiny

When *Rideout* reached the First Circuit the court ignored *Reed*'s three-part test and instead applied intermediate scrutiny based on the state's benign intentions.¹⁵⁰ The First Circuit held the section 659:35 of the New Hampshire Code was subject to intermediate scrutiny because there was a substantial mismatch between the state's objectives—preventing vote buying and voter coercion—and the means the state selected to achieve this goal: section 659:35.¹⁵¹ The court determined that, while preventing voter fraud is a valid state interest in the abstract,¹⁵² section 659:35 was a broad prophylactic prohibition that did not respond precisely to the significant state interest and thus did not withstand intermediate scrutiny.¹⁵³ Further, like the district court, the circuit court concluded that the state failed to prove an actual problem existed;¹⁵⁴ even though digital photos and social media have been around for “several election cycles,” the state could not identify a single complaint of voter fraud related to posting a ballot selfie.¹⁵⁵

Finally, the First Circuit held that section 659:35 was not narrowly tailored. First, the law was not narrowly tailored because it infringed on many voters' free speech rights, not just a small, “hypothetical pool of voters who, New Hampshire fears, may try to sell their votes.”¹⁵⁶ Second, the state failed to prove that other laws that ban voter fraud (such as prohibiting voters from buying and selling votes) would not serve the asserted state interest.¹⁵⁷ The circuit court concluded that “[t]he ballot-selfie prohibition is like ‘burn[ing down] the house to roast

delays in the polling place “as ballot-selfie takers try to capture the marked ballot and face in one frame—all while trying to catch the perfect smile.” *Id.* Furthermore, the Sixth Circuit reasoned that ballot selfies could compromise the secrecy of another's vote since Michigan voting stalls are simply tall desks, in rows, with short dividers. *Id.* at 399.

150. *Rideout 2d Cir.*, 838 F.3d at 72–75.

151. *Id.* at 72.

152. *Id.*

153. *Id.* at 73.

154. *Id.* at 72.

155. *Id.* at 73.

156. *Rideout 2d Cir.*, 838 F.3d at 74.

157. *Id.* In *Hill v. William*, the District of Colorado followed the First Circuit and granted a preliminary injunction enjoining the enforcement and prosecution of Colorado Revised Statute section 1-13-712(1), which prohibited ballot exposure. The district court declined to determine whether the law was content based or content neutral and applied intermediate scrutiny for the purposes of ruling on the preliminary injunction motions. While the court found that “[n]o one disputes that reducing the risk of voter fraud . . . is a significant governmental interest,” the court nevertheless suggested that the law might not be narrowly tailored because other Colorado laws address voter fraud. *Hill v. Williams*, No. 16-cv-02627, 2016 U.S. Dist. LEXIS 155460 (D. Colo. 2016).

the pig.”¹⁵⁸

4. The Public Forum Doctrine

In *Silberberg*, Plaintiffs sought a preliminary injunction to enjoin the enforcement of New York Election Law section 17-130(10), which prohibits ballot exposure.¹⁵⁹ To determine the appropriate level of scrutiny the Southern District of New York applied the public forum doctrine.¹⁶⁰

The court found that the polling place has long been regarded as a nonpublic forum.¹⁶¹ Therefore, section 17-130(10) must only satisfy the reasonableness standard.¹⁶² Applying this standard, the court first decided that the law was viewpoint neutral; section 17-130(10) prohibits voters from showing their marked ballot regardless of whether the individual voted for a Republican or a Democrat.¹⁶³ Second, the district court concluded that the law was reasonable.¹⁶⁴ The court examined the history of the Australian ballot and reasoned that ballot selfies “plausibly increase[] the risk of . . . voter intimidation.”¹⁶⁵ Like the Sixth Circuit, the district court analogized to *Burson* and stated that when a law has been in effect for a long time it is difficult for the state to present evidence of what would happen if the law were revoked.¹⁶⁶ Section 17-130(10) was not overinclusive, according to the court,

158. *Rideout 2d Cir.*, 838 F.3d at 74–75 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). While the First Circuit applied intermediate scrutiny, the court suggested that strict scrutiny *may* be appropriate. The court stressed that section 659:35 was unconstitutional “*even applying only intermediate scrutiny.*” *Id.* at 72. Moreover, the circuit court did not say the district court was wrong to apply strict scrutiny. Thus, the First Circuit left undecided what level of scrutiny is appropriate for assessing laws banning ballot selfies. The Indiana district court added to this ambiguity by applying intermediate scrutiny in addition to strict scrutiny. Even under this lower standard the court found that section 3-11-8-17.5 was unconstitutional. According to the court, the law was overinclusive because the state failed to prove that the “broad array” of photos prohibited by the law were related to the asserted state interest. *Ind. Civil Liberties Union Found. Inc. v. Ind. Sec’y of State*, No. 1:15-cv-01356-SEB-DML, 2015 WL 12030168, *7 (S.D. Ind. Oct. 19, 2015).

159. *Silberberg v. Bd. of Elections of N.Y.*, No. 16-cv-8336, 2016 U.S. Dist. LEXIS 152784, *2 (S.D.N.Y. 2016). (citing N.Y. ELEC. LAW § 17-130(10) (2016)).

160. *Id.* at *9–12.

161. *Id.* at *10 (citing *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001); *PG Publ’g Co. Aichele*, 705 F.3d 91, 100 n.10 (3d Cir. 2013); *United Food & Commer. Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 749–50 (6th Cir. 2004)).

162. *Silberberg*, 2016 U.S. Dist. LEXIS 152784, at *10.

163. *Id.* at *12–13.

164. *Id.* at *13–17.

165. *Id.* at *14.

166. *Id.* at *15. The court distinguished *Rideout* and *Indiana Civil Liberties Union* by pointing out that the laws at issue in those cases were recently enacted regulations that targeted ballot selfies, while § 17-130(10) is a general ballot-exposure prohibition that has been in place for 126 years. *Id.* at *15–16.

because the reasonableness standard does not require a perfect fit between the ends and the means.¹⁶⁷ Accordingly, the court found section 17-130(10) satisfied the reasonableness standard and denied the injunction.¹⁶⁸

III. ANALYSIS

The remainder of this comment argues: (1) laws that target ballot selfies, such as section 659:35 of the New Hampshire Code, should be subject to strict scrutiny; (2) such laws are constitutional even under this rigorous standard; and (3) laws that ban ballot exposure generally are subject to the public forum doctrine's reasonableness standard and are hence more clearly constitutional.

Section A claims that, despite the emerging trend in which lower federal courts attempt to circumvent *Reed* by expanding alternative free speech doctrines, *Reed* is the controlling law in free speech issues. Section B explains that, under *Reed*, laws that target ballot selfies are subject to strict scrutiny. Next, Section C demonstrates the existence of a compelling interest in preventing voter fraud by analogizing to *Burson*. Section D holds that laws such as section 659:35 of the New Hampshire Code are narrowly tailored under *Burson*. Section E argues that laws that ban ballot exposure are subject to the reasonableness standard under the public forum doctrine and are thus more clearly constitutional. Finally, Section F maintains that the Supreme Court should grant certiorari on *Rideout* to clarify that *Reed* is the controlling law and to make known that laws that target ballot selfies laws satisfy strict scrutiny.

A. *Reed Is the Controlling Law*

Reed is the controlling law on free speech issues. In *Reed*, the Supreme Court not only resolved the circuit split, but also went on to establish a three-part test to determine whether a regulation is content based or content neutral. This three-part test was intended to clarify the free speech doctrine and guide lower courts.

Hence, the First Circuit was wrong to rely on pre-*Reed* law to determine the appropriate standard of review when evaluating

167. *Id.* at *17.

168. *Silberberg*, 2016 U.S. Dist. LEXIS 152784, at *24. Like the Sixth Circuit, the New York district court stressed the ill timing of the suit, which was brought only thirteen days before the 2016 presidential election even though the statute had been in use for 126 years and smartphone cameras have been common since 2007. *Id.* at *4. The court stated that enjoining the enforcement of the law just days before the election would "seriously disrupt the election process" and cause confusion among voters and poll workers. *Id.* at *20.

regulations that target ballot selfies. The First Circuit should have followed the New Hampshire and Indiana district courts and applied *Reed*.

B. Strict Scrutiny

Under *Reed*'s three-part test, laws that target ballot selfies, like section 659:35, are subject to strict scrutiny. First, such laws are facially content based because they discriminate based on subject matter. In his brief to the First Circuit, New Hampshire Secretary General Gardner argued that section 659:35 does not discriminate based on subject matter because the law forbids all photos of marked ballots, irrespective of what is written on the ballot.¹⁶⁹ Yet, this argument confuses subject matter based distinctions and viewpoint discrimination. While section 659:35 does not discriminate based on one's viewpoint—under section 659:35, taking a photo of a marked ballot is illegal regardless of whether the photo displays a vote for a Democrat or a Republican—this does not mean that section 659:35 does not discriminate based on subject matter. Since a fact finder must know not only that a photo was taken but also must examine the content of the photo to determine whether it violates the law, section 659:35 discriminates based on subject matter and thus is facially content based.

Second, the court does not need to inquire into the state's intention in passing laws that target ballot selfies because such laws are facially content based. Third, since laws that prohibit ballots selfies are facially content based they are subject to strict scrutiny.¹⁷⁰

C. Compelling State Interest

To withstand strict scrutiny a law must be narrowly tailored to meet a

169. Memorandum of Law Addressing *Reed v. Town of Gilbert, Rideout v. Gardner*, 123 F.Supp.3d 218 (D.N.H. 2015) (No. 1:14-cv-00489-PB), 2016 WL 5400062.

170. Secretary Gardner wrongly argued in his motion for summary judgment that section 659:35 is subject to intermediate scrutiny because, like the electioneering law in *Burson*, is a valid time, place, manner restriction. Memorandum of Law in Support of Defendant's Cross Motion for Summary Judgment, *Rideout v. Gardner*, 123 F.Supp.3d 218, (D.N.H. 2015) (No. 1:14-cv-00489), 2015 WL 5656698 [hereinafter Defendant's Motion for Summary Judgment]. This argument is flawed because, unlike the electioneering law in *Burson*, section 659:35 prohibits voters from showing a photo of their marked ballot outside the polling place. As Snapchat points out in its amicus brief to the First Circuit, "The drama of [making a political statement via a ballot selfie] takes place well clear of the polling place. It plays out in people's homes, schools, offices, restaurants – wherever people happen to be with a smartphone, which is pretty much anywhere." Brief Amicus Curiae of SnapChat, Inc. in Support of Appellees and Affirmance at 14–15, *Rideout v. Gardner* 838 F.3d 65 (2d Cir. 2016) (No. 15-2021) [hereinafter Brief Amicus Curiae of SnapChat]

compelling state interest.¹⁷¹ Ballot selfie prohibitions serve the compelling interest of protecting voters and the electoral process from voter fraud. Absent ballot selfie bans, voters may be offered money or coerced into voting a certain way and verifying their vote via a photo of their marked ballot.¹⁷² By forbidding the photography of marked ballots, ballot selfie prohibitions secure the right to vote according to one's conscience.¹⁷³ This, in turn, protects the democratic process by ensuring that election results are an accurate reflection of the electorate's intentions.

To prove a compelling state interest the government must identify an "actual problem" in need of solving.¹⁷⁴ As the Sixth Circuit suggested, the history of the Australian ballot, together with evidence of recent vote-buying schemes, proves an actual problem exists.

First, like the Sixth Circuit and New York district court proposed, the state can prove an actual harm. In *Burson*, the Supreme Court found that the history of the Australian ballot proved the dangers of voter fraud and that the long-term use of similar electioneering laws relieved the state from needing to produce recent evidence of actual harm. Likewise, here the history of the Australian ballot proves the harmful effects of voter fraud. Further, as in *Burson*, the longstanding use of ballot-exposure prohibitions—the historical predecessor of laws that target ballot selfies—relieves the state from needing to produce recent evidence of vote buying and voter intimidation. Accordingly, even though the state may not have evidence of voter fraud via photography,¹⁷⁵ the state can demonstrate a compelling state interest. As the district court explained in *Silberberg*, "The absence of recent evidence of . . . voter bribery or intimidation does not mean the motivation to engage in such conduct no longer exists. Rather, it is consistent with the continued effectiveness of the . . . statute."¹⁷⁶

Second, while the history of the Australian ballot alone proves an actual harm under *Burson*, the Six Circuit¹⁷⁷ and Secretary Gardner¹⁷⁸

171. *E.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

172. *See* Appellate Brief for Defendant at 2–3, *Rideout v. Gardner*, 838 F.3d 65 (2d Cir. 2016) (No. 15-2021), 2016 WL 2942476

173. *Id.* at 3.

174. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000).

175. Appellant Brief of Plaintiff at 32, *Rideout v. Gardner*, 838 F.3d 65 (2d Cir. 2016) (No. 15-2021), 2016 WL 2942476.

176. *Silberberg v. Bd. of Elections of N.Y.*, No. 16-cv-8336, 2016 U.S. Dist. LEXIS 152784, *3–4 (S.D.N.Y. 2016).

177. *Crookston v. Johnson*, 841 F.3d 396, 400 (6th Cir. 2016) (citing *United States v. Robinson*, 813 F.3d 251, 254 (6th Cir. 2016); *United States v. Turner*, 536 F. App'x 614, 615 (6th Cir. 2013); *United States v. Young*, 516 F. App'x 599, 600–01 (6th Cir. 2013).

went on to demonstrate that voter fraud continues to exist by pointing to recent cases that dealt with vote-buying schemes. In his article “A Picture is Worth a Thousand Words,” defense attorney Daniel A. Horwitz argues that the state cannot prove an actual harm because vote-buying and voter coercion are practically nonexistent today.¹⁷⁹ However, even if these election problems are rare, the Sixth Circuit and Secretary Gardner made known that they nevertheless continue to occur. Given that the right to vote for the candidate of one’s choosing is “at the heart of this country’s democracy,”¹⁸⁰ the enduring existence of voter fraud is problematic even if infrequent.¹⁸¹

One may maintain that ballot selfie prohibitions limit political speech and thus raise the level of constitutional review and the state cannot prove a compelling interest under this heightened standard. Such an argument would reason that because the primary purpose of the First Amendment is to protect political speech,¹⁸² “the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”¹⁸³

Nonetheless, *Burson* demonstrates that a law that restricts political speech can satisfy this heightened standard if the law is necessary to protect the integrity of the electoral system. In *Burson*, the Court recognized that the electioneering law called the judiciary to balance two fundamental constitutional rights: the right to vote and the right to engage in political discourse.¹⁸⁴ The Court determined that while the electioneering law limited the right to speak politically, the history of the Australian ballot and the longstanding use of similar laws proved that the regulation was necessary to protect the right to vote. Equally,

178. Defendant’s Motion for Summary Judgment, *supra* note 170 (citing *United States v. Johnson*, 2012 U.S. Dist. LEXIS 76320, *1 (E.D. Ky. Aug. 21, 2012); *United States v. Shatley*, 448 F.3d 264, 265–66 (4th Cir. 2006); *United States v. Thomas*, 510 F.3d 714, 717 (7th Cir. 2007)).

179. Horwitz claims that absentee ballots are the simplest form of vote buying because they are filled out outside the polling place. Because all elections are conducted by mail in Oregon and Washington, Horwitz reasons that if vote buying existed today, it would be found in these states. Nevertheless, since the practice of conducting all elections by mail began twenty years ago, there has only been one demonstrated instance of vote buying in Oregon and no record of vote buying exists in Washington. 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, 251, 257–59 (2015).

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

181. Further, in the fall of 2016, the State Attorney Office in Kankakee County, Illinois opened an investigation of voter fraud. In response to the pending investigation, the county decided not to distribute “I voted” stickers at the polling places in the 2016 presidential election because the stickers could be used to verify a purchased vote. Unlike ballot selfies, “I voted” stickers do not verify how one voted. Richard Hasen, *County, Investigating Voter Fraud, Will Bar “I Voted” Stickers Because of Fear of Vote Buying*, ELECTION LAW BLOG (Oct. 4, 2016), <http://electionlawblog.org/?p=87140>.

182. *E.g.*, *Burson*, 504 U.S. at 196.

183. *Id.* (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

184. *Id.* at 198.

ballot selfie prohibitions call courts to balance the right to vote and the right to employ political speech. Like *Burson*, the history of the Australian ballot and the established use of similar prohibitions prove that ballot selfie bans are necessary to protect the right to vote.

Furthermore, as the Supreme Court stated in *Burson*, “[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively . . .”¹⁸⁵ According to political scientist Fabrice Lehoucq, vote buying increases when parties are able to verify how one voted.¹⁸⁶ Richard L. Hasen, a professor of election law and campaign finance at the University of California, Irvine, School of Law, agrees: “Our experience with absentee ballots shows that the potential for fraud and coercion increases when people can verify” with “objective evidence how they voted.”¹⁸⁷ In light of this understanding, the legislature’s decision to prohibit ballot selfies is logical because digital photography and social media present a new means of verifying how one voted.¹⁸⁸

D. Narrowly Tailored

Once a state has proven a governmental interest, the state must demonstrate that the law is narrowly tailored to meet that interest.¹⁸⁹ As stated, the Court applies two narrowly tailored requirements: one for strict scrutiny and one for intermediate scrutiny. Both narrowly tailored requirements demand that the state address seemingly more tailored options and prove that they would not sufficiently protect the state interest.¹⁹⁰

The First Circuit held that New Hampshire section 659:35 was not

185. *Burson*, 504 U.S. at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)). In *First Amendment – Free Speech – First Circuit Strikes Down State Ban on Ballot Selfies*, the author argues that courts should give greater deference to legislatures on election law issues because legislatures are better able to address questions of complex social facts. *First Amendment – Free Speech – First Circuit Strikes Down State Ban on Ballot Selfies – Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016), 130 HARV. L. REV. 1728, 1731–34 (2017).

186. Lehoucq, *supra* note 19, at 42.

187. Melissa Heelan Stanzione, *Do Ballot Selfies Open Door to Election Crime?*, 85 U.S.L.W. 452 (2016) (internal quotation marks omitted).

188. Defendant’s Motion for Summary Judgment, *supra* note 170.

189. *E.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

190. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (holding that the buffer zones outside of abortion clinics were not narrowly tailored because the state “ha[d] not shown that it seriously undertook to address the problem with less intrusive tools readily available to it” such as greater enforcement of criminal statutes forbidding assault and trespass); *see also Cutting v. City of Portland*, 802 F.3d 79, 91–92 (1st Cir. 2015) (holding that the law banning medians in streets was not narrowly tailored because the city did not explain why it did not try less restrictive means of addressing road safety).

narrowly tailored under intermediate scrutiny.¹⁹¹ Prior to enacting section 659:35, neither the New Hampshire legislature nor the Secretary of State's Office conducted studies to determine whether more tailored means of addressing voter fraud existed (such as forbidding buying votes and coercing voters).¹⁹² Absent these studies, the First Circuit concluded that the state failed to demonstrate that more tailored laws did not adequately address the asserted compelling state interest.¹⁹³

Yet, *Burson* reveals that such studies are unnecessary even under strict scrutiny's narrowly tailored requirement. In *Burson*, the Court held that the electioneering law was narrowly tailored because "it is difficult to isolate the exact effect of [electioneering] laws on voter intimidation and election fraud. Voter intimidation and election fraud are successful precisely because they are difficult to detect."¹⁹⁴ While the First Amendment demands that the state not sacrifice speech for efficiency,¹⁹⁵ in *Burson* the Supreme Court suggested that this rule can be bent when balancing the right to engage in political discourse and the right to vote.¹⁹⁶

Consequently, section 659:35 is narrowly tailored under *Burson*. Like in *Burson*, it is difficult to measure seemingly more tailored laws' effects on vote buying and voter coercion because such schemes are hard to detect. Therefore, due to the importance of preserving the right to vote, the state is relieved from proving that feasibly more tailored options do not adequately address the problem.

Accordingly, laws that target ballot selfies such as section 659:35 are constitutional even under strict scrutiny. If a law banning ballot selfies were crafted in a way that avoided strict scrutiny the law would be even more clearly constitutional.

E. General Ballot-Exposure Prohibitions

1. A Modern Ballot-Exposure Law and the Public Forum Doctrine

As the New York district court suggested, laws prohibiting ballot exposure are more clearly constitutional because the laws are nonpublic forum regulations that are subject to the reasonableness standard, which

191. *Rideout 2d Cir.*, 838 F.3d 65, 72 (2d Cir. 2016).

192. Appellant Brief of Plaintiff, *supra* note 175, at 16.

193. *Rideout 2d Cir.*, 838 F.3d at 74.

194. *Burson v. Freeman*, 504 U.S. 198, 208 (1992).

195. *Ind. Civil Liberties Union Found. Inc. v. Ind. Sec'y of State*, No. 1:15-cv-01356-SEB-DML, 2015 WL 12030168, *14 (S.D. Ind. Oct. 19, 2015).

196. *See Burson*, 504 U.S. at 208.

is easily satisfied.¹⁹⁷ Many states, such as New Hampshire and Indiana, wish to update their ballot-exposure laws to account for changes in technology. Legislatures can accomplish this goal while staying within the confines of the public forum doctrine by enacting laws that prohibit photography and videography in the polling place.

A law banning photography and videography in the polling place would be subject to the public forum doctrine, which is still good law after *Reed*. As evidenced above, the polling place is a nonpublic forum; laws regulating speech in the polling place must only be viewpoint neutral and reasonable. First, the law would be viewpoint neutral because it would forbid all photography in the polling place regardless of the photographer's political affiliation.

Second, the law would be reasonable. The history of the Australian ballot, evidence of recent vote-buying schemes, and the understanding that vote-buying increases when votes can be verified all suggest that prohibiting photography and videography in the polling place is a "common sense"¹⁹⁸ regulation needed to protect the modern voter. This "common sense" regulation is reasonable because, as the Sixth Circuit and New York district court proposed, ballot selfies could disrupt the voting process and cause significant delays.¹⁹⁹ What is more, like the Sixth Circuit²⁰⁰ and Secretary Gardener²⁰¹ pointed out, ballot selfie prohibitions only restrict one form of political speech; voters have countless other ways to express civic pride. Voters can electioneer for their preferred candidates, attend rallies, or help citizens register to vote.²⁰² Notably, many of these alternative forms of political speech are more effective ways to endorse a candidate than merely posting a ballot selfie.²⁰³

197. The First and Sixth Circuits seem to agree that a law banning ballot exposure would be more limited and thus more easily pass constitutional review. The First Circuit distinguished *Burson*, finding that "the intrusion on the voters' First Amendment rights is much greater here than that involved in *Burson* [because section 659:35] does not secure the immediate physical site of elections, but instead controls the use of imagery of marked ballots, regardless of where, when, and how that imagery is publicized." *Rideout 2d Cir.*, 838 F.3d at 73. While the First Circuit was wrong to strike down section 659:35, the court was correct to point out that polling place regulations are more limited. Likewise, the Sixth Circuit upheld the Michigan law because it forbid ballot exposure "at the polls" and distinguished the Michigan regulation from the laws at issue in *Rideout* and *Indiana Civil Liberties Union*, which targeted ballot selfies. *Crookston v. Johnson*, 841 F.3d 396, 401 (6th Cir. 2016) (emphasis added).

198. *Crookston*, 841 F.3d at 400 (citing *Burson*, 504 U.S. at 207) (internal quotation marks omitted).

199. *Id.* at 401 (concurrency); *Silberberg v. Bd. of Elections of N.Y.*, No. 16-cv-8336, 2016 U.S. Dist. LEXIS 152784, *21–22 (S.D.N.Y. 2016).

200. *Crookston*, 841 F.3d at 400.

201. Appellate Brief for Defendant, *supra* note 172, at 2.

202. Andrew Downs, *Downs: Ballot Selfies Unlikely to Corrupt Democracy*, INDYSTAR (Oct. 26, 2015), http://leaguelafayette.org/files/151026-indystart-ballot_selfies_unlikely_to_corrupt.pdf.

203. *Id.*

One may contend that a law prohibiting photography and videography in the polling place is unreasonable because ballot selfies are a unique form of civic pride. As Snapchat argued in its amicus brief to the First Circuit, ballot selfies show whom one voted for and thus demonstrates that a voter not only talks-the-talk but walks-the-walk.²⁰⁴ Admittedly, alternate means of communicating civic pride do not disclose one's vote as powerfully as a ballot selfie. Nevertheless, the history of the Australian ballot proves that restricting this particular form of political speech is necessary to protect the secrecy of the vote and the integrity of the electoral process.

2. The Secondary Effects Test and *Reed*

The Sixth Circuit followed the emerging lower court trend and tried to avoid *Reed* and strict scrutiny by using the secondary effects test, but this was improper and unnecessary. The Sixth Circuit reasoned that, as in *Connection Distributing Co.*, where section 7513(a) of the POEA was upheld because the government was trying to prevent the exploitation of children through pornography, the Michigan law banning ballot exposure was valid because the state was trying to prevent the unwanted secondary effects of ballot selfies: vote buying and voter coercion. However, this argument is erroneous. Despite the trend in lower courts, the Supreme Court has repeatedly restricted the secondary effects test to controversial social issues, such as abortion.²⁰⁵

In addition, the use of the secondary effects test was unnecessary because (the public forum doctrine aside), under *Reed*, a law prohibiting photography and videography in the polling place only raises intermediate scrutiny, and the law would easily satisfy that standard. First, the law would be facially content neutral because it would not discriminate based on viewpoint or subject matter; the law would forbid all photography in the polling place, regardless of the photographer's political views or the content of the photo.²⁰⁶ Second, because the law would be facially content neutral, the court would examine the state's intention in passing the law. Because the law would not be enacted to favor some speech over others, it would be content neutral.

Third, because the law would be content neutral it would raise intermediate scrutiny, which it would withstand. As argued, laws that target ballot selfies satisfy strict scrutiny's compelling state interest

204. Brief Amicus Curiae of Snapchat, *supra* note 170, at 12.

205. See Connolly & Weinstein, *supra* note 55, at 599.

206. Further, the law would be neutral in purpose because it would not prohibit voters from taking a photo to demonstrate a problem with a voting machine because voting machines are outside the voting booth.

requirement. Accordingly, this more limited photography ban would meet intermediate scrutiny's less rigorous significant state interest requirement. Furthermore, the law would be narrowly tailored because it would leave open ample, alternative channels of communicating civic pride, as evidenced above.

Like the First Circuit, one may argue that a law prohibiting photography and videography in the polling place would not withstand intermediate scrutiny because the law is overbroad as it restricts more political speech than speech involved vote-buying schemes. However, as the Court made clear in *Hill v. Colorado*, under intermediate scrutiny, "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance."²⁰⁷ The overbreadth doctrine merely requires that the restriction not be "substantial" "judged in relation to the statute's plainly legitimate sweep."²⁰⁸ Under *Burson*, the state can demonstrate an actual harm in voter fraud. Therefore, even though the proposed ballot selfie law would likely effect more political speech than speech involved in vote-buying schemes, prohibiting this one form of political speech would not be "substantial" judged in relation to the state's proven need to protect the secrecy of the vote.

3. Addressing Counterarguments

Like the Sixth Circuit, one may question whether a state can forbid ballot selfies via a ballot-exposure prohibition while also issuing absentee ballots.²⁰⁹ Despite this legitimate concern, ballot selfie bans are constitutional even in states that issue absentee ballots. As argued, a state has great power to control speech in the polling place so long as the restriction is reasonable.²¹⁰ Moreover, the reasonableness standard does not require a perfect fit between the ends and the means.²¹¹

Last, one may contend that ballot selfie bans, whether targeted or general, do not accurately respond to vote buying. Horwitz claims that ballot selfies do not effectively confirm bought votes since voters can alter their ballots after taking a photo.²¹² However, what Horwitz

207. *Hill v. Colorado*, 530 U.S. 703, 730–1 (2000).

208. *Id.* at 732.

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

210. *See Burson v. Freeman*, 504 U.S. 198, 211 (1992).

211. *Longo v. U.S. Postal Serv.*, 983 F.2d 9, 12 (2d Cir. 1992).

212. Horwitz, *supra* note 179, at 261–60. A recent election in Russia seems to support Horwitz's position. The night before a 2016 election, students at Chelyabinsk State University were told to vote for Putin's party, United Russia, to express their gratitude for receiving scholarships. The students were instructed to use their cell phones to take a picture of their marked ballots to confirm their votes. Some students placed a thread in the shape of a check mark on their ballot next to the box that read United

forgets is that selfies take the form of photos and videos. A video of a voter inserting his or her marked ballot into the voting machine would definitively show how he or she voted.

F. Moving Forward

States are divided on the legality of ballot selfies. At least thirty states prohibit the disclosure of ballots,²¹³ many explicitly forbidding photos and videos of marked ballots.²¹⁴ Other states, including Maine, Oregon, Utah, and Arizona, permit voters to display photos of their marked ballots outside the polling place.²¹⁵ And still, many states' stances on the lawfulness of ballot selfies is unclear, leaving voters unsure whether or not they may post photos of their marked ballots online.²¹⁶

Rideout was appealed to the Supreme Court²¹⁷ and subsequently denied certiorari without comment.²¹⁸ The Supreme Court should grant certiorari to the next circuit case reviewing a law banning ballot selfies to make clear that *Reed* is the controlling law on free speech issues. Lower courts may apply alternative doctrines when appropriate—such as using the public forum doctrine when reviewing laws that prohibit ballot exposure—but the courts cannot avoid *Reed* by applying pre-*Reed* law, as did the First Circuit.

More importantly, by granting certiorari, the Court can clarify that laws that specifically target ballot selfies are constitutional under strict scrutiny. This holding would imply that more limited ballot-exposure laws are also constitutional.

IV. CONCLUSION

Ballot selfie prohibitions call courts to balance two fundamental

Russia, took a photo of the ballot, and then removed the thread and voted as they pleased. Benjamin Nathans, *The Real Power of Putin*, THE NEW YORK REVIEW OF BOOKS (Sep. 29, 2016), <http://www.nybooks.com/articles/2016/09/29/real-power-vladimir-putin/>.

213. Joseph Weber, *States, Courts Wrestle with Allowing 'Ballot Selfies,'* FOX NEWS (Aug. 15, 2016), <http://www.foxnews.com/politics/2016/08/15/states-courts-wrestle-with-allowing-ballot-selfies.html>.

214. *Id.*

215. Appellant Brief of Plaintiff, *supra* note 175, at 31.

216. See David L. Hudson Jr., *States Seek to Stop People from Posting Online Photos Showing How They Voted*, A.B.A. J. 15 (May 1, 2016), http://www.abajournal.com/magazine/article/states_seek_to_stop_voters_from_posting_ballot_selfies.

217. Petition for Writ of Certiorari, *Rideout v. Gardner*, 838 F.3d 65 (2d Cir. 2016).

218. Greg Stohr, *Ballot Selfies Allowed as U.S. Supreme Court Rebuffs New Hampshire*, BLOOMBERG (Apr. 3, 2017), <https://www.bloomberg.com/politics/articles/2017-04-03/ballot-selfies-allowed-as-u-s-high-court-rebuffs-new-hampshire>.

rights: the right to vote for the candidate of one's choice and the right to engage in political discourse. In this case, the right to vote trumps free speech. The history of the Australian ballot and the continued existence of vote-buying schemes prove the need to preserve the secrecy of the vote. Further, ballot selfie bans only limit one form of political speech. States that wish to preserve the right to vote by banning ballot selfies should enact laws that prohibit photography and videography in the polling place. Such a regulation would be subject to the public forum doctrine's reasonableness standard, which it would easily satisfy.