No. _____

In The
Supreme Court of the United States

WILLIAM M. GARDNER, in his official capacity as Secretary of State of the State of New Hampshire,

Petitioner,

v.

LEON H. RIDEOUT, ANDREW LANGOIS, and BRANDON D. ROSS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2014, New Hampshire amended N.H. Rev. Stat. Ann. (RSA) § 659:35, I, to address the potential harm caused by the use of recent technology in voter coercion and vote buying schemes. The amendment prohibited a voter from allowing "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 voted except as provided in RSA 659:20." The prohibition expressly included "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."

The questions presented are:

1. Whether N.H. RSA 659:35, I, is narrowly tailored to serve a significant governmental interest, thus passing intermediate scrutiny.

2. Whether any restriction placed on speech by N.H. RSA 659:35, I, is content-neutral.

3. Whether N.H. RSA 659:35, I, serves a compelling governmental interest and is narrowly tailored to achieve that interest, thus passing strict scrutiny.

PARTIES TO THE PROCEEDING

The Petitioner is William M. Gardner, in his official capacity as Secretary of State for the State of New Hampshire.

The Respondents are Leon H. Rideout, Andrew Langois and Brandon D. Ross. There are no other parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

William M. Gardner, in his official capacity as Secretary of State for the State of New Hampshire respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit in this matter is reported as *Rideout v. Gardner*, 838 F.3d 65 (2016) (App. 1).[1]

The opinion of the United States District Court for the District of New Hampshire in this matter is reported as *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015) (App. 22).

JURISDICTION

Judgment of the First Circuit was entered on September 28, 2016. This petition for certiorari is filed within 90 days of the issuance of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] "App." refers to the appendix to this petition and page number.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1, provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RSA 659:35, I, as amended by HB 366, provides as follows:

> 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 voted except as provided

> in RSA 659:20.[2] 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. (Footnote added).
>
> RSA 659:35, II, provides as follows:
>
> No voter shall place a distinguishing mark upon his or her ballot nor write in any name as the candidate of his or her choice with the intention of thereby placing a distinguishing mark upon the ballot.

STATEMENT OF THE CASE

At the heart of this case lies the authority of the New Hampshire Legislature to proactively amend its current statutory scheme in order to protect the purity and integrity of the State's election process in light of the dynamic changes made by technology over the past

[2] RSA 659:20 states: "Any voter who declares to the moderator under oath that said voter needs assistance marking his or her ballot shall, upon the voter's choice and request after the moderator has informed the voter of the accessible voting options that are available at the polling place, receive the assistance of one or both of the inspectors of election detailed for that purpose by the moderator or of a person of the voter's choice provided that the person is not the voter's employer or union official. Such person so assisting shall be sworn, shall mark the ballot as directed by said voter, and shall thereafter give no information regarding the same. Such person so assisting shall leave the space within the guardrail with the voter."

quarter century. In 2014, the New Hampshire Legislature amended N.H. Rev. Stat. Ann. (RSA) § 659:35, I, to ensure that the voters of New Hampshire can cast their votes free from the threat of reprisal, ensuring that elections in New Hampshire are not purchased or coerced. The purpose of the amendment was to update the statute, which was first enacted in the 1890s, in order to maintain its effectiveness in an age of social media and digital photography.

Prior to the 2014 amendment, the statute, in pertinent part, read as follows, "[n]o voter shall allow his ballot to be seen by any person with the intention of letting it be known how he is about to vote except as provided in RSA 659:20." N.H. RSA 659:35, I (2013). The statute, in its pre-2014 version, was only effective during the short period of time between when the voter left the voting booth and when the voter inserted the ballot in the ballot box or electronic counting device.

The amended statute, effective September 1, 2014, now reads as follows:

> 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 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.***

N.H. RSA 659:35, I (2014) (emphasis added to highlight amendment).

As amended, the statute prohibits a voter from using his or her ballot as evidence of how he or she voted after the ballot leaves his or her possession, thereby thwarting the efforts of those who would seek to obtain votes by purchase or threatened harm or those who would seek profit by selling their vote. What the amendment does not do is prevent a voter from expressing how he or she voted by any means other than by use of an official ballot.

On October 31, 2014, three New Hampshire voters, under investigation for violating the amended statute, filed a complaint pursuant to 42 U.S.C. § 1983 challenging the law on First Amendment grounds. In an Order dated August 11, 2015, the United States District Court for the District of New Hampshire (Barbadoro, J.) held that the amended statute is a content-based restriction on speech that on its face violates the First Amendment. App. 55.

The New Hampshire Secretary of State appealed the District Court's decision to the United States Court of Appeals for the First Circuit.

The First Circuit affirmed on narrower grounds, holding that the statute as amended fails to meet the test for intermediate scrutiny under the First Amendment and that the statute's purpose cannot justify the restrictions it imposes on speech. App. 12-13. The First Circuit placed significant weight on the lack of evidence that images of completed ballots are presently being used to facilitate vote buying and voter coercion schemes in New Hampshire, ruling that intermediate

scrutiny is not satisfied by assertions of abstract interests. App. 14.

The First Circuit further held that the statute similarly failed for lack of narrow tailoring, finding that there are less restrictive alternatives available. App. 16. Because the First Circuit held that the statute fails under intermediate scrutiny, it did not address the question of whether it is a content-based regulation.

REASON TO GRANT THE PETITION

This Case Presents Important Issues of Constitutional Law Which Should Be Settled By This Court

"[T]he Constitution of the United States protects the right of all qualified citizens to vote." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). "[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 355. Such a crucial right is protected "by the secret ballot, the hard-won right to vote one's conscience without fear of

retaliation." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995). The secret ballot exemplifies the respected tradition of anonymity in the advocacy of political causes. *Id.* With recent advances in technology, one's right to vote freely without fear of retaliation is in jeopardy. Technology such as digital photography and social media allow other parties to invade the sanctity of the voting booth and eliminate the anonymity of the secret ballot.

This crucial right to vote by secret ballot has not always been protected. In the late nineteenth century, political parties, unions and other organizations had the ability to print their own ballots which for the most part were distinguishable by size and color. App. 3. Ballots that were distinguishable allowed the various organizations to monitor how individuals voted, which in turn allowed voter coercion and intimidation to flourish. *Id.* In 1891, New Hampshire passed legislation which required the Secretary of State to prepare ballots for state and federal elections. *Id*.

New Hampshire's statute banning the display of a marked ballot dates as far back as 1911. 1911 N.H. Laws Ch. 102, Sec. 2. The earliest version of the statute made it illegal for a voter to "allow his ballot to be seen by any person, with the intention of letting it be known how he is about to vote." The use of the term "about to vote" reflects then-current technology. At the time, a voter only had the ability to publish his ballot to another for the brief period of time between when he left the voting booth and when he cast his ballot. Once the

ballot was cast, the voter no longer possessed it, thus removing direct evidence of how he voted.

With digital photography and the ability to disseminate images through social media, a voter's right to cast his or her ballot free from intimidation and coercion has become vulnerable. The aforementioned advances in technology allow those who would seek to influence an election to do so easily and on a wide scale. To address that concern, New Hampshire updated RSA 659:35, I, which now prohibits the display of the ballot after it has been cast.

Numerous states have enacted similar laws to address a voter photographing himself or herself with a marked ballot – a practice now commonly known as a ballot selfie. Eighteen states have laws on the books that in some form prevent a voter from displaying his or her ballot. Katie Rogers, *Are Selfies With Your Ballot Legal? Depends on Where You Vote*, The New York Times (Nov. 8, 2016) at http://www.nytimes.com/2016/11/09/us/politics/ballot-selfies.html. Twelve other states have laws that make it unclear whether or not it is illegal to publish an image of a marked ballot. *Id.*

Currently there are three states dealing with challenges to similar statutes in the federal court system. *Silberberg v. Bd. of Elections of N.Y.*, filed on October 26, 2016, is an action to enjoin the enforcement of a provision of New York's election laws, which bars the act of photographing one's image together with one's marked ballot for the purpose of posting the photograph on a social media site. *Silberberg v. Bd. of*

Elections of N.Y., 2016 U.S. Dist. LEXIS 152784, *2. In that case, the United States District Court for the Southern District of New York declined to issue a preliminary injunction based in large part on concern that granting such an injunction shortly before the election would likely cause serious disruption to the election process. *Id*. at *18-19. That matter is still pending before the district court.

In *Crookston v. Johnson*, the United States Court of Appeals for the Sixth Circuit stayed the United States District Court for the Western District of Michigan's order enjoining the enforcement of a similar law at the November 2016 election. 2016 U.S. App. LEXIS 19494. The law prohibits voters from exposing their marked ballots to others and bans the use of video cameras, cell phone cameras, cameras, television and recording equipment in the polling places, with a limited exception for the news media. In *Crookston*, Plaintiff sought a preliminary injunction to prevent the State from enforcing the Michigan law in the upcoming election so that he could take a "ballot selfie" with his cell phone and post it on social media, which was granted by the district court.[3] *Id*. at *1. The circuit court stayed the district court's decision for similar reasons as the *Silberberg* court. *Id.* at *2. That matter is still pending before the district court.

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[3] The Court noted that a distinguishing feature between the case before it and the case which is the subject of this petition was that the law at issue in *Crookston* was a general ban on ballot-exposure and photography at the polls.

In *Hill v. Williams*, Plaintiffs filed a Verified Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunction against the Colorado Secretary of State, and Cynthia H. Coffman, Colorado Attorney General, both in their official capacities. *Hill v. Williams*, 2016 U.S. Dist. LEXIS 155460 *2-3. The complaint was later amended to add the Denver District Attorney, in his official capacity. The District Court granted a requested preliminary injunction prohibiting Defendants from enforcing a Colorado election law similar to the statute in this case, unless the display of the marked ballot is in connection with violations of other criminal laws. *Id*. at *36. The case is on appeal to the Tenth Circuit Court of Appeals.

In holding that the New Hampshire statute as amended fails to meet the test for intermediate scrutiny under the First Amendment and that the statute's purpose cannot justify the restrictions it imposes on speech, the First Circuit placed significant weight on the lack of evidence that images of completed ballots are presently being used to facilitate vote buying and voter coercion schemes in New Hampshire. App. 14. The State respectfully asserts this holding was in error in light of the *Burson* case.

In *Burson v. Freeman*, 504 U.S. 191 (1992), where this Court addressed a similar issue with regard to the 100-foot buffer zone around polling places created by the Tennessee statute at issue in that case, Justice Stevens in his dissenting opinion wrote:

> [T]he Tennessee statute does not merely regulate conduct that might inhibit voting; it bars the simple "display of campaign posters, signs, or other campaign materials." § 2-7-111(b). Bumper stickers on parked cars and lapel buttons on pedestrians are taboo. The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd.
>
> The evidence introduced at trial to demonstrate the necessity for Tennessee's campaign-free zone was exceptionally thin. Although the State's sole witness explained the need for special restrictions *inside* the polling place itself, she offered no justification for a ban on political expression *outside* the polling place.

Burson, 504 U.S. at 218-19.

In its response, the plurality commented that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter." *Id*. at 207-08. The plurality further believed the long, uninterrupted, and prevalent use of the statutes put in place to combat voter intimidation and election fraud makes it difficult for States to come forward with the sort of proof the dissent wished to require. *Id*. at 208. The Court went on to say that:

> [R]equiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud "would necessitate that a State's political system sustain some level of damage before the legislature could

> take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights."

Id. at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

The First Circuit incorrectly distinguished *Burson* from the current case. The First Circuit claimed "[t]he intrusion on the voters' First Amendment rights is much greater [in this case] than that involved in *Burson*." App. 16. The Court went on to say that the statute "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 the imagery is publicized." *Id*. This reasoning is in error, securing the sanctity of the voting booth is exactly what RSA 659:35, I, as amended by HB 366 does. Justice Scalia in his concurring opinion in *Burson*, noted that "restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot." *Burson*, 504 U.S. at 214. Although Justice Scalia believed that the law at issue was content-based, he still considered it as constitutional because it was a reasonable, viewpoint-neutral regulation of a nonpublic forum. *Id*. Almost 25 years has passed since this Court issued its opinion in *Burson*. It cannot be disputed that the world is a different place because technology has advanced so

significantly since that time. Social media and digital imagery were nonexistent 25 years ago. This case presents the Court with the opportunity to once again provide guidance with regard to the balance of two fundamental rights being "the right to cast a ballot in an election free from the taint of intimidation and fraud" and "the exercise of free speech."

The questions posed in this case are important issues of constitutional concern not yet addressed by the Supreme Court. The procedural posture and facts of this case make it an excellent vehicle for this Court to settle important questions regarding the constitutionality of statutes prohibiting ballot selfies. Where the First Circuit's judgment impacts the most fundamental of rights, which is the right to vote one's conscience without fear of retaliation, this case merits plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 15-2021

LEON H. RIDEOUT, ANDREW LANGLOIS, BRANDON D. ROSS,

Plaintiffs, Appellees,

v.

WILLIAM M. GARDNER, in his official capacity as Secretary of State of the State of New Hampshire,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Paul J. Barbadoro, *U.S. District Judge*]

Before

Lynch, Lipez, and Thompson, *Circuit Judges*.

Stephen G. LaBonte, Assistant Attorney General, with whom Joseph A. Foster, New Hampshire Attorney General, and Laura E. B. Lombardi, Senior Assistant Attorney General, were on brief, for appellant.

Gilles R. Bissonnette, with whom American Civil Liberties Union of New Hampshire, William E. Christie, and Shaheen & Gordon, P.A. were on brief, for appellees.

Christopher T. Bavitz, Cyberlaw Clinic, Harvard Law School, Justin Silverman, and Andrew F. Sellars on brief for The New England First Amendment Coalition and The Keene Sentinel, amici curiae.

Eugene Volokh and Scott & Cyan Banister First Amendment Clinic, UCLA School of Law on brief for the Reporters Committee for Freedom of the Press, amicus curiae.

Neal Kumar Katyal, Sean Marotta, Hogan Lovells US LLP, Christopher T. Handman, and Dominic F. Perella on brief for Snapchat, Inc., amicus curiae.

September 28, 2016

LYNCH, ***Circuit Judge*****.** In 2014, New Hampshire amended a statute meant to avoid vote buying and voter intimidation by newly forbidding citizens from photographing their marked ballots and publicizing such photographs. While the photographs need not show the voter, they often do and are commonly referred to as "ballot selfies." The statute imposes a fine of up to $1,000 for a violation of the prohibition. *See* N.H. Rev. Stat. Ann. § 659:35, IV; *id.* § 651:2, IV(a).

Three New Hampshire citizens who are under investigation for violation of the revised statute, and who are represented by the American Civil Liberties Union of New Hampshire, challenged the statute's constitutionality. The district court held that the statute is a content-based restriction of speech that on its face violates the First Amendment. *Rideout* v. *Gardner*, 123 F. Supp. 3d 218, 221 (D.N.H. 2015). The New Hampshire Secretary of State appeals, arguing that the statute is justified as a prophylactic measure to prevent new technology from facilitating future vote buying and voter coercion. We affirm on the narrower ground that the statute as amended fails to meet the test for intermediate scrutiny under the First Amendment and that the statute's purposes cannot justify the restrictions it imposes on speech.

I.

In the late nineteenth century, political parties, unions, and other organizations had the power to print their own ballots, each of which was easily identifiable and distinguishable from other ballots by size and color. This practice allowed the ballot-printing organizations to observe how individuals voted at the polls, which in turn created an obviously coercive environment. During this period, New Hampshire undertook a series of reforms to combat widespread vote buying and voter intimidation. In 1891, the State passed legislation requiring the Secretary of State to prepare ballots for state and federal elections. 1891 N.H. Laws ch. 49, § 10. The State then passed a statute to forbid any

voter from "allow[ing] his ballot to be seen by any person, with the intention of letting it be known how he is about to vote." 1911 N.H. Laws ch. 102, § 2.

Since at least 1979, that provision has been codified in relevant part at section 659:35, I, which, until 2014, read: "No voter shall allow his ballot to be seen by any person with the intention of letting it be known how he is about to vote except as provided in RSA 659:20." The exception in section 659:20 allows voters who need assistance marking a ballot to receive such assistance. N.H. Rev. Stat. Ann. § 659:20. In 2014, the New Hampshire legislature revised section 659:35, I as follows:

> 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 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.

Id. § 659:35, I (revisions underlined). The penalty for a violation of the statute is a fine of up to $1,000. *Id.* § 659:35, IV; *id.* § 651:2, IV(a).

The original version of HB366, the bill amending section 659:35, I, provided that "[n]o voter shall take a photograph or a digital image of his or her marked ballot," and was introduced by State Representative Timothy Horrigan on January 3, 2013. Horrigan stated

that "[t]he main reason this bill is necessary is to prevent situations where a voter could be coerced into posting proof that he or she voted a particular way." The bill started at the House Committee on Election Law, which recommended its passage, and the members of which expressed rationales for the bill similar to Horrigan's.

The bill then went to the House Committee on Criminal Justice and Public Safety. Deputy Secretary of State David Scanlan spoke in support of the bill, emphasizing the need to prevent vote buying and to protect the "privacy of [the] ballot." Though a majority of the members of the Criminal Justice Committee supported the bill, a minority disagreed and filed a report concluding that the bill was "an intrusion on free speech." In order to restrict the bill's scope to activity connected to vote buying, the minority suggested amending the bill as follows:

> 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 *only if the distribution or sharing is for the purpose of receiving pecuniary benefit, as defined in RSA 640:2, II(c), or avoiding harm, as defined in RSA 640:3*.[1]

[1] New Hampshire law defines "pecuniary benefit" as "any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it

The majority of the Criminal Justice Committee did not support this amendment, however, and HB366, absent the proposed limitation, proceeded to the full House of Representatives, which passed it by a vote of 198-96. The bill was then introduced to the Senate Committee on Public and Municipal Affairs, which recommended the bill to the full Senate. The Senate passed the bill, and the Governor signed the bill into law, effective September 1, 2014.

The legislative history of the bill does not contain any corroborated evidence of vote buying or voter coercion in New Hampshire during the twentieth and twenty-first centuries. Representative Mary Till, who authored the House Committee on Election Law's statement of intent for the bill, provided the sole anecdotal allegation of vote buying. She asserted:

> I was told by a Goffstown resident that he knew for a fact that one of the major parties paid students from St[.] Anselm's $50 to vote in the 2012 election. I don't know whether that is true or not, but I do know that if I were going to pay someone to vote a particular way,

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does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally." N.H. Rev. Stat. Ann. § 640:2, II(c).

New Hampshire law defines "harm" as "any disadvantage or injury, to person or property or pecuniary interest, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested, provided that harm shall not be construed to include the exercise of any conduct protected under the First Amendment to the United States Constitution or any provision of the federal or state constitutions." N.H. Rev. Stat. Ann. § 640:3, II.

> I would want proof that they actually voted that way.

No evidence supported this hearsay allegation. The district court correctly held that "[t]he summary judgment record does not include any evidence that either vote buying or voter coercion has occurred in New Hampshire since the late 1800s." *Rideout*, 123 F. Supp. 3d at 224.

As of August 11, 2015, when the district court issued the summary judgment order on appeal here, the New Hampshire Attorney General's Office had undertaken investigations of four individuals for alleged violations of section 659:35, I, arising from their publication of "ballot selfies"[2] after voting in the September 9, 2014 Republican primary election. Three of those individuals – Leon Rideout, Andrew Langlois, and Brandon Ross – are the plaintiffs in this case.[3]

Rideout, a member of the New Hampshire House of Representatives and a Selectman for Lancaster,

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[2] Amicus curiae Snapchat highlights the extent of the use of "ballot selfies," defined not strictly as "a photo where the photographer is also a subject," but rather as "all smartphone pictures shared online, including those here . . . [and] any picture that could violate the New Hampshire statute." As amici curiae New England First Amendment Coalition and the *Keene Sentinel* observe, "the term 'ballot selfie' has worked its way into the popular lexicon to describe just such a photograph." *See, e.g.*, David Mikkelson, *Ballot Selfies*, Snopes (Feb. 8, 2016), http://www.snopes.com/dont-selfie-your-ballot.

[3] All three plaintiffs have entered into agreements with the State to toll the three-month statute of limitations period for section 659:35, I, pending resolution of this litigation.

New Hampshire, took a photograph of his ballot, which showed that he had voted for himself and other Republican candidates in the September 9, 2014 primary. Later that day, he posted the ballot selfie on his Twitter feed and on his House of Representatives Facebook page. He then explained in an interview with the *Nashua Telegraph*, published on September 11, 2014, that he took and posted the photograph online "to make a statement," and that he thought section 659:35, I was "unconstitutional."

Langlois, who voted in Berlin, New Hampshire, did not approve of the Republican candidates for the United States Senate, and so wrote in the name of his recently deceased dog, "Akira," and took a photograph of his ballot. When he returned home, he posted the ballot selfie on Facebook with a note that read in part: "Because all of the candidates SUCK, I did a write-in of Akira. . . ." He was then called by an investigator from the New Hampshire Attorney General's Office and informed he was under investigation.

Ross, who was a candidate for the New Hampshire House of Representatives in the 2014 primary, voted in Manchester, New Hampshire. He took a photograph of his marked ballot, which reflected that he voted for himself and other Republican candidates. He was aware of HB366's amendment to section 659:35, I and, because of the law's penalties, did not immediately publicize the ballot selfie. More than a week later, on September 19, 2014, having learned that other voters were under investigation for violating section 659:35, I, Ross posted the ballot selfie on Facebook with a note

reading: "Come at me, bro." Representative Horrigan, the legislator who had introduced the amendment to section 659:35, I, filed an election law complaint against Ross, which led to an investigation of Ross by the state Attorney General's Office.

On October 31, 2014, the plaintiffs filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the District of New Hampshire. The complaint sought a declaration invalidating section 659:35, I as unconstitutional on its face and as applied, and an injunction forbidding New Hampshire from enforcing the statute. The parties filed cross-motions for summary judgment and agreed that no material facts are in dispute.

In a thoughtful opinion, the district court determined that section 659:35, I is a content-based restriction on speech. *Rideout*, 123 F. Supp. 3d at 229. The court observed that the Supreme Court has identified statutes as content-based restrictions "if [the] law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (quoting *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)). The district court reasoned that "the law [under review] is plainly a content-based restriction on speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter." *Id.*

The district court applied strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 228 (quoting *Reed*, 135

S.Ct. at 2231). Secretary Gardner, the named defendant, asserted the prevention of vote buying and voter coercion as the State's compelling interests justifying the restriction. *Id.* at 231. The district court found that although those two asserted interests were "plainly compelling in the abstract," *id.* "neither the legislative history nor the evidentiary record compiled by the Secretary in defense of this action provide any support for the view that the state has an actual or imminent problem with images of completed ballots being used to facilitate either vote buying or voter coercion," *id.* at 232. And the court found that the statute was not narrowly tailored because it was "vastly overinclusive" and would, "for the most part, punish only the innocent while leaving actual participants in vote buying and voter coercion schemes unscathed." *Id.* at 234. Moreover, the court observed that the Secretary had failed to demonstrate why narrower alternatives, such as a statute "mak[ing] it unlawful to use an image of a completed ballot in connection with vote buying and voter coercion," would not advance the purported state interests. *Id.* at 235. The district court held the statute to be unconstitutional on its face and granted declaratory relief to the plaintiffs, trusting that such relief absent an injunction would secure compliance by the Secretary. *Id.* at 236.

II.

We give de novo review to an appeal both from a ruling on cross-motions for summary judgment and from pure issues of law. *Maritimes & Ne. Pipeline, LLC*

v. *Echo Easement Corridor, LLC*, 604 F.3d 44, 47 (1st Cir. 2010); *Am. Home Assurance Co.* v. *AGM Marine Contractors, Inc.*, 467 F.3d 810, 812 (1st Cir. 2006). Here, no material facts are in dispute; the issues are ones of law. *See Buchanan* v. *Maine*, 469 F.3d 158, 162 (1st Cir. 2006) (de novo review of issues of law on appeal from summary judgment).

The First Amendment, which applies to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Standards to evaluate justifications by the state of a restriction on speech turn, inter alia, on whether the restriction focuses on content, that is, if it applies to "particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* Content-based regulations are subject to strict scrutiny, which requires the government to demonstrate "a compelling interest and . . . narrow[] tailor[ing] to achieve that interest." *Id.* at 2231 (quoting *Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 734 (2011)). Narrow tailoring in the strict scrutiny context requires the statute to be "the least restrictive means among available, effective alternatives." *Ashcroft* v. *Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004).

In contrast, content-neutral regulations require a lesser level of justification. These laws do not apply to

speech based on or because of the content of what has been said, but instead "serve[] purposes unrelated to the content of expression." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the context of expression is deemed neutral. . . ." *Id.* (citation omitted). Content-neutral restrictions are subject to intermediate scrutiny, which demands that the law be "narrowly tailored to serve a significant governmental interest." *Id.* "[U]nlike a content-based restriction of speech, [a content-neutral regulation] 'need not be the least restrictive or least intrusive means of' serving the government's interests." *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2535 (2014) (quoting *Ward*, 491 U.S. at 798).

We reach the conclusion that the statute at issue here is facially unconstitutional even applying only intermediate scrutiny.[4] *See, e.g.*, *McCutcheon* v. *Fed. Election Comm'n*, 134 S. Ct. 1434, 1446 (2014) ("Because we find a substantial mismatch between the Government's stated objective and the means selected to

[4] The district court chose to rely on reasoning that section 659:35, I is a content-based restriction. *Rideout*, 123 F. Supp. 3d at 229. To reach this conclusion, it relied heavily on the Supreme Court's recent decision in *Reed*. *Id.* at 228-29. Secretary Gardner vigorously contests this conclusion. As the statute fails even intermediate scrutiny, we need not resolve the question of whether section 659:35, I is a content-based regulation.

achieve it, the aggregate limits fail even under the 'closely drawn' test. We therefore need not parse the differences between the two standards in this case."). Like in *McCutcheon*, there is a substantial mismatch between New Hampshire's objectives and the ballot-selfie prohibition in section 659:35, I.[5]

In order to survive intermediate scrutiny, section 659:35, I must be "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534 (quoting *Ward*, 491 U.S. at 796). Though content-neutral laws "'need not be the least restrictive or least intrusive means of' serving the government's interests," *id.* at 2535 (quoting *Ward*, 491 U.S. at 798), "the government still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals,'" *id.* (quoting *Ward*, 491 U.S. at 799). The statute fails this standard.

Secretary Gardner essentially concedes that section 659:35, I does not respond to a present "'actual problem' in need of solving." *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (quoting *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000)). Instead, he argues that the statute serves prophylactically to "preserve the secrecy of the ballot" from potential future vote buying and voter coercion, because ballot selfies make it easier for voters to prove how

[5] Because the statute fails under intermediate scrutiny, we also need not reach the plaintiffs' argument that the statute fails under the overbreadth doctrine. *See, e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 473 (2010).

they voted. He characterizes the amendment in section 659:35, I as a natural update of the older version of the statute, done in response to the development of "modern technology, such as digital photography and social media," which may facilitate a future rise in vote buying and voter intimidation schemes.

As the district court noted, the prevention of vote buying and voter coercion is unquestionably "compelling in the abstract." *Rideout*, 123 F. Supp. 3d at 231. But intermediate scrutiny is not satisfied by the assertion of abstract interests. Broad prophylactic prohibitions that fail to "respond[] precisely to the substantive problem which legitimately concerns" the State cannot withstand intermediate scrutiny. *Members of City Council of City of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

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. As the plaintiffs note, "small cameras" and digital photography "have been in use for at least 15 years," and New Hampshire cannot identify a single complaint of vote buying or intimidation related to a voter's publishing a photograph of a marked ballot during that period. Indeed, Secretary Gardner has admitted that New Hampshire has not received any complaints of vote buying or voter intimidation since at least 1976, nor has he pointed to any such incidents since the nineteenth century. "[T]he government's burden is not met when a 'State offer[s] *no* evidence or

anecdotes in support of its restriction.'" *El Día, Inc.* v. *P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 116 (1st Cir. 2005) (alteration in original) (quoting *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995)).[6]

Secretary Gardner also highlights scattered examples of cases involving vote buying from other American jurisdictions. *See United States* v. *Thomas*, 510 F.3d 714, 717 (7th Cir. 2007); *United States* v. *Shatley*, 448 F.3d 264, 265-66 (4th Cir. 2006); *United States* v. *Johnson*, No. 5:11-CR-143, 2012 WL 3610254, at *1 (E.D. Ky. Aug. 21, 2012). But Secretary Gardner admits that "there is no evidence that digital photography [of a ballot shared with others by a voter] played a[ny] role in any of the examples" he cites. A few recent instances of vote buying in other states do not substantiate New Hampshire's asserted interest in targeting vote buying through banning the publication of ballot selfies.

Secretary Gardner tries to anchor the state interest for section 659:35, I on *Burson* v. *Freeman*, 504 U.S.

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[6] Secretary Gardner does point to history abroad. He references the plebiscite held upon the German annexation of Austria in 1938, in which "Adolf Hitler instituted election rules that allowed voters to voluntarily show their ballot as they were voting." He also notes that Saddam Hussein employed ballots "contain[ing] a code number which he believed could be traced back to the voter." There is no evidence that these historical examples from dictatorships have any material relationship to the present political situation in the State of New Hampshire, a democracy. Indeed, the restrictions on speech imposed by this amendment are antithetical to democratic values and particularly impose on political speech.

191 (1992) (plurality opinion), which held that Tennessee had a compelling interest in banning "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place." *Id.* at 193. *Burson* is obviously distinguishable. The discussion in *Burson* of the long history of regulating polling places and the location of elections makes clear that the interest at stake in *Burson* centered on the protection of physical election spaces from interference and coercion. *See id.* at 200-10. The plurality acknowledged in *Burson* that two competing interests had to be balanced: the right to speak on political issues and the right to be free from coercion or fraud at the polling place. *Id.* at 211.

The intrusion on the voters' First Amendment rights is much greater here than that involved in *Burson*. Section 659:35, I 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.

But even accepting the possibility that ballot selfies will make vote buying and voter coercion easier by providing proof of how the voter actually voted, the statute still fails for lack of narrow tailoring. "[B]y demanding a close fit between ends and means, the tailoring requirement [under intermediate scrutiny] prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen*, 134 S. Ct. at 2534

(third alteration in original) (quoting *Riley* v. *Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).[7]

New Hampshire has "too readily forgone options that could serve its interests just as well, without substantially burdening" legitimate political speech. *Id.* at 2537. At least two different reasons show that New Hampshire has not attempted to tailor its solution to the potential problem it perceives. First, the prohibition on ballot selfies reaches and curtails the speech rights of all voters, not just those motivated to cast a particular vote for illegal reasons. New Hampshire does so in the name of trying to prevent a much smaller hypothetical pool of voters who, New Hampshire fears, may try to sell their votes. New Hampshire admits that no such vote-selling market has in fact emerged. And to the extent that the State hypothesizes this will make intimidation of some voters more likely, that is no reason to infringe on the rights of all voters.

Second, the State has not demonstrated that other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified. *See* 18 U.S.C. § 597 (prohibiting buying or selling votes); 52 U.S.C. § 10307(b) (prohibiting voter coercion or intimidation); *id.* § 10307(c) (prohibiting "pay[ing] or offer[ing] to pay or accept[ing] payment either for

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[7] Amicus curiae Snapchat notes, by analogy, that other circuits have similarly held bans on petit juror interviews to fail at narrow tailoring. *See In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982); *United States* v. *Sherman*, 581 F.2d 1358, 1360-61 (9th Cir. 1978). We need not examine the analogy.

registration to vote or for voting" in some federal elections); N.H. Rev. Stat. Ann. § 659:40, I (prohibiting vote-related bribery); *id.* § 659:40, II (prohibiting voter coercion or intimidation); *id.* § 659:37 (prohibiting interfering with voters). New Hampshire suggests that it has no criminal statute preventing a voter from selling votes. That can be easily remedied without the far reach of this statute. The State may outlaw coercion or the buying or selling of votes without the need for this prohibition.[8]

As the district court observed, there are less restrictive alternatives available:

> [T]he state has an obviously less restrictive way to address any concern that images of completed ballots will be used to facilitate vote buying and voter coercion: it can simply make it unlawful to use an image of a completed ballot in connection with vote buying and voter coercion schemes.

Rideout, 123 F. Supp. 3d at 235; *see also McCullen*, 134 S. Ct. at 2539 ("[T]he Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate."). Indeed, as to narrow tailoring, the plaintiffs point to the

[8] Of course, another solution to New Hampshire's dilemma of not having a statute that criminalizes vote selling would be to enact such a statute.

language of the very limitation proposed by the minority of the House Criminal Justice Committee, but rejected by the majority of that Committee. The ballot-selfie prohibition is like "burn[ing down] the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

There are strong First Amendment interests held by the voters in the speech that this amendment prohibits. As the Supreme Court has said, "[t]he use of illustrations or pictures . . . serves important communicative functions: it attracts the attention of the audience to the [speaker's] message, and it may also serve to impart information directly." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

The restriction affects voters who are engaged in core political speech, an area highly protected by the First Amendment. As amici point out, there is an increased use of social media and ballot selfies in particular in service of political speech by voters.[9] A ban on ballot selfies would suppress a large swath of political

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[9] Amicus Snapchat stresses that "younger voters participate in the political process and make their voices heard" through the use of ballot selfies. According to the Pew Research Center, in the 2012 election, "22% of registered voters have let others know how they voted on a social networking site such as Facebook or Twitter," "30% of registered voters [were] encouraged to vote for [a particular candidate] by family and friends via posts on social media such as Facebook and Twitter," and "20% of registered voters have encouraged others to vote by posting on a social networking site." Lee Raine, Pew Research Center, *Social Media and Voting* (Nov. 6, 2012), http://www.pewinternet.org/2012/11/06/social-media-and-voting/.

speech, which "occupies the core of the protection afforded by the First Amendment," *McIntyre*, 514 U.S. at 346,; *see also Glik* v. *Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (holding that there is a First Amendment interest in videotaping government officials performing their duties in public places). 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.

Section 659:35, I reaches and prohibits innocent political speech by voters unconnected to the State's interest in avoiding vote buying or voter intimidation. The plaintiffs' examples show plainly that section 659:35, I "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 134 S. Ct. at 2535 (quoting *Ward*, 491 U.S. at 799); *see also McIntyre*, 514 U.S. at 351 (holding that, despite legitimate interest in reducing fraud, government could not impose "extremely broad prohibition" on anonymous leafleting about ballot measures). Indeed, several states have now expressly authorized ballot selfies, and those states have not reported an uptick in vote buying or voter intimidation.[10]

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[10] *See* A.B. 1494, 2015-16 Reg. Sess. (Cal. 2016) (enrolled Aug. 26, 2016) (amending statute to provide that "[a] voter may voluntarily disclose how he or she voted if that voluntary act does not violate any other law"); S.B. 1287, 52d Leg., 1st Reg. Sess. (Ariz. 2015) (making clear that there is no violation where "[a] voter . . . makes available an image of the voter's own ballot by posting on the internet or in some other electronic medium"); H.B. 72, Gen. Sess. (Utah 2015) (effective May 12, 2015) (amending statute to make clear that statute "does not prohibit an individual from

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."

III.

The judgment of the district court is *affirmed*.

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transferring a photograph of the individual's own ballot in a manner that allows the photograph to be viewed by the individual or another"); S.B. 1504, 77th Or. Leg. Assemb., 2d Reg. Sess. (Or. 2014) (effective Jan. 1, 2015) (repealing language in statute that "[a] person may not show the person's own marked ballot to another person to reveal how it was marked"); H.P. 1122, 125th Leg., 1st. Reg. Sess. (Me. 2011) (repealing prohibition of showing a "marked ballot to another with the intent to reveal how that person voted"); R.I. State Bd. of Elections, ERLID No. 8372, Rules and Regulations for Polling Place Conduct (2016) (specifying that "[t]he electronic recording of specific vote(s) cast by another person is prohibited").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Leon H. Rideout,
Andrew Langlois, and
Brandon D. Ross

v.

William M. Gardner,
New Hampshire Secretary
of State

Case No. 14-cv-489-PB
Opinion No.
2015 DNH 154 P

MEMORANDUM AND ORDER

(Filed Aug. 11, 2015)

New Hampshire recently adopted a law that makes it unlawful for voters to take and disclose digital or photographic copies of their completed ballots in an effort to let others know how they have voted. Three voters, who are under investigation because they posted images of their ballots on social media sites, have challenged the new law on First Amendment grounds. As I explain in this Memorandum and Order, the new law is invalid because it is a content-based restriction on speech that cannot survive strict scrutiny.

I. BACKGROUND

It has been unlawful since at least 1979 for a New Hampshire voter to show his ballot to someone else with an intention to disclose how he plans to vote. *See* N.H. Rev. Stat. Ann. § 659:35, I (2008). In 2014, the legislature amended section 659:35, I of the New

Hampshire Revised Statutes ("RSA 659:35, I") to provide that:

> 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 voted*** except as provided in RSA 659:20.[1] ***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.***

N.H. Rev. Stat. Ann. § 659:35, I (Supp. 2014) (emphasis added to identify the modifications that became effective September 1, 2014). At the same time, the legislature reduced the penalty for a violation of RSA 659:35, I from a misdemeanor to a violation. 2014 N.H. Legis. Serv. 80 (codified as amended at N.H. Rev. Stat. Ann. § 659:35, IV). Thus, anyone who violates the new law faces a possible fine of up to $1,000 for each violation. N.H. Rev. Stat. Ann. § 651:2, IV(a) (establishing maximum penalty for a violation).

A. Legislative History

State Representative Timothy Horrigan introduced a bill to amend RSA 659:35, I on January 3, 2013. *See* Exhibit G to the Declaration of Gilles Bissonnette, Esq. in Support of Plaintiffs' Motion for

[1] RSA 659:20 allows a voter who needs assistance marking his or her ballot to receive assistance. N.H. Rev. Stat. Ann. § 659:20.

Summary Judgment ("Legislative History") at 000048, 000140, *Rideout v. Gardner*, No. 14-cv-489-PB (filed Mar. 27, 2015).[2] As initially proposed, the bill simply stated that "[n]o voter shall take a photograph or a digital image of his or her marked ballot." *Id.* at 000144. In testimony in favor of the bill, Representative Horrigan explained why he was proposing his amendment:

> Last fall, in late October 2012, one of the workers at my local Democratic campaign office received her absentee ballot. After she filled it out, she was about to have a photo of her ballot taken to be posted to her social media accounts. We began to worry taking such a photo might be a violation of federal and state election laws. It turns out that this may not necessarily have been a violation of the letter of the law – but it would definitely be a violation of the spirit of RSA 659:35 "Showing or Specially Marking a Ballot."

Id. at 000142. He also stated, "The main reason this bill is necessary is to prevent situations where a voter could be coerced into posting proof that he or she voted a particular way." *Id.*

The bill first went to the House Committee on Election Law (the "Election Committee"), which recommended its passage with only a slight organizational

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[2] The plaintiffs filed a legislative history as Exhibit G to the Declaration of Gilles Bissonnette, Esq. in Support of Plaintiffs' Motion for Summary Judgment. The exhibit is not available electronically because it exceeds the size allowed by ECF. The parties have agreed to the exhibit's authenticity by stipulation. *See* Doc. No. 19-7.

change and the requirement that posters be placed in polling places informing voters of the new law. *See* Legislative History at 000110, 000114. Members of the Election Committee noted that "showing your ballot on social media could cause und[ue] influence from employers or parents" and that the bill "protects privacy of voter[s] and stops coercion." *Id.* at 000130. Representative Mary Till wrote the statement of intent for the Election Committee, noting, "RSA 659:35 was put in place to protect voters from being intimidated or coerced into proving they voted a particular way by showing their completed ballot or an image of their completed ballot." *Id.* at 000114.

The bill was then referred to the House Committee on Criminal Justice and Public Safety (the "Criminal Justice Committee"), a majority of which recommended approval of the bill with the penalty reduced from a misdemeanor to a violation. *See* Legislative History at 000076, 000078. Notes from the Criminal Justice Committee's hearing indicate that some committee members were concerned with whether the bill and its penalties were necessary. *See id.* at 000099-000100. Representative Horrigan defended the law during the hearing, explaining that it "tightens up" existing law governing election fraud. *Id.* at 000099. Deputy Secretary of State David Scanlan also spoke in support of the bill, providing a "history of voting irregularities, including votes being bought."[3] *Id.* at 000100. When asked whether the bill was necessary, Deputy

[3] The legislative history does not further describe Deputy Secretary Scanlan's testimony on this point.

Secretary Scanlan responded that the "privacy of [the] ballot must be preserved." *Id.* Ultimately, a majority of the Criminal Justice Committee recommended passing the bill so long as the penalty was decreased to a violation. *Id.* at 000076, 000078.

A minority of the Criminal Justice Committee, however, filed a report concluding that it would be "inexpedient to legislate" the bill. *See* Legislative History at 000083. The minority wrote:

> Although the Minority agrees that the Criminal Justice Committee acted wisely in reducing the penalty from a misdemeanor to a violation, we believe this remains a very bad bill. . . . [I]t is not needed because we already have laws which prohibit people from selling their votes for financial gain, and that was the only reason supporters gave for passing the bill. . . . [T]his bill as drafted is overly broad. As such, it represents an intrusion on free speech. It fights a bogey man, which does not exist, at the expense of yielding even more of our freedoms.

Id. The minority suggested further amendment of the final sentence of paragraph I as follows:

> 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 ***only if the distribution or sharing is for the purpose of receiving pecuniary benefit, as***

defined in RSA 640:2, II(c),[4] ***or avoiding harm, as defined in RSA 640:3.***[5]

Id. at 000097 (emphasis added to denote minority's suggestions). Such an amendment, they argued, would make it illegal only to post a photo for financial gain or to avoid harm. *Id.* at 000083. They noted that this was the original intent of the bill according to the Secretary of State. *Id.* Nevertheless, the amendment was not supported by the majority of the Criminal Justice Committee and accordingly was not added to the bill that was presented to the House of Representatives. *Id.* at 000076, 000078.

The bill, as amended by the Election Committee and the majority of the Criminal Justice Committee, passed the full House by a veto-proof 198-96 majority. *See* Legislative History at 000063. On April 9, 2014, the Senate Public and Municipal Affairs Committee held a hearing, at which Representatives Horrigan and Till and Deputy Secretary Scanlan testified in support of the bill. Representative Horrigan stated that the

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[4] Section 640:2, II(c) of the New Hampshire Revised Statutes provides: " 'Pecuniary benefit' means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally." N.H. Rev. Stat. Ann. § 640:2, II(c).

[5] Section 640:3, II of the New Hampshire Revised Statutes provides: " 'Harm' means any disadvantage or injury, to person or property or pecuniary interest, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested. . . ." N.H. Rev. Stat. Ann. § 640:3, II.

practice of posting images of ballots on social media accounts "compromises the security of the polling place and the secrecy of the ballot." *Id.* at 000063. He also cautioned that "[t]he new high-tech methods of showing a ballot absolutely could be used to further a serious vote-buying scheme." *Id.* Similarly, Representative Till explained that "the seemingly innocent bragging about how one voted by posting a photo of one's completed ballot on Facebook, could undermine efforts to [e]nsure that no one is coerced into voting a particular way." *Id.* at 000064. On April 17, 2014, the Senate Committee on Public and Municipal Affairs recommended that the bill "ought to pass," and the Senate then passed the bill. *Id.* at 000057. On June 11, 2014, Governor Maggie Hassan signed the bill into law, effective September 1, 2014.

The new law's legislative history reveals that its opponents were concerned that the proposed law would infringe freedom of speech. In response, Representative Horrigan stated:

> The bill's opponents framed this as a free speech issue, but political speech is in fact prohibited at the polling place. You absolutely have the right to engage in as much free speech as you want to beyond the boundary marked by the "No Electioneering" signs. However, the space inside that boundary is a secure space where the debate stops and the secret balloting begins.

Legislative History at 000063. Representative Till also addressed the opponents' concern, stating:

> [E]very voter is free to tell as many people as they desire, in whatever forum they choose, how they voted. What is not allowed is to show one's completed ballot since, once cast, the ballot is the property of the state and in order to protect the secrecy of the ballot cannot be publicly identified with a particular voter.

Id. at 000064.

B. Vote Buying and Voter Coercion

Secretary of State William Gardner, the defendant in this action, defends the new law on the grounds that it is needed to prevent vote buying and voter coercion.

1. Evidence of Vote Buying and Voter Coercion in New Hampshire

The legislative history of the 2014 amendment to RSA 659:35 contains only a single reference to an actual alleged instance of vote buying in New Hampshire. As Representative Till described the incident:

> I was told by a Goffstown resident that he knew for a fact that one of the major parties paid students from St Anselm's $50 to vote in the 2012 election. I don't know whether that is true or not, but I do know that if I were going to pay someone to vote a particular way, I would want proof that they actually voted that way.

Legislative History at 000064. She did not provide any other details about the incident, and it is not discussed elsewhere in the legislative history.

The summary judgment record does not include any evidence that either vote buying or voter coercion has occurred in New Hampshire since the late 1800s. *See* Doc. No. 18-1 at 2. Moreover, the state has received no complaints that images of marked ballots have been used to buy or coerce other votes. *See* Exhibit B to the Declaration of Gilles Bissonnette, Esq. in Support of Plaintiffs' Motion for Summary Judgment ("Exhibit B") at 11, *Rideout v. Gardner*, No. 14-cv-489-PB (filed Mar. 27, 2015).

2. Vote Buying and Voter Coercion in the United States

There is no doubt that vote buying and voter coercion were at one time significant problems in the United States. *See Doe v. Reed*, 561 U.S. 186, 226 (2010) (Scalia, J., concurring) (citing *Burson v. Freeman*, 504 U.S. 191, 202 (1992) (plurality opinion)); Susan C. Stokes, et al., *Brokers, Voters, and Clientelism: The Puzzle of Distributive Politics* 200 (2013); Richard Hasen, Vote Buying, 88 Cal. L. Rev. 1323, 1327 (2000); Jill Lepore, *Rock, Paper, Scissors: How We Used To Vote*, New Yorker, Oct. 13, 2008, http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors.

Initially, the United States followed the *viva voce* system of voting used in England, in which voting "was

not a private affair, but an open, public decision, witnessed by all and improperly influenced by some." *Burson*, 504 U.S. at 200. Gradually, states repealed the *viva voce* system in favor of written ballots. *Id.* At first, voters were expected to provide their own pen and paper, but when that became too complex, parties provided voters with printed ballot paper with a "ready-made slate of candidates." L.E. Fredman, *The Australian Ballot: The Story of an American Reform* 21 (1968).

Because early written ballots were not secret ballots, they provided an opportunity for parties to buy votes. The parties used ballot paper that "was colored or otherwise recognizable" from a distance to ensure that the voter used the ballot he was given. *Id.* at 22; *see Burson*, 504 U.S. at 200. Ballot peddlers or district captains then paid voters as they emerged from the polling place. Fredman, *supra*, at 22. For instance, in 1892, 16% of Connecticut voters were "up for sale" at prices ranging from $2 to $20. *Id.* at 23. Similarly, in 1887, a "study of New York City politics estimated that one-fifth of voters were bribed." Stokes, *supra*, at 227.

By the end of the 19th century, most of the United States had adopted a new voting method referred to as the "Australian ballot." Fredman, *supra*, at 83. The Australian ballot is a method of voting using a secret ballot that was first used in Australia in the mid-19th century. *Id.* at 7-9. It has four characteristics: (1) ballots are "printed and distributed at public expense"; (2) ballots contain the names of all nominated candidates; (3) ballots are distributed "only by . . . election officers

at the polling place"; and (4) "detailed provisions" are made for physical arrangements to ensure secrecy when casting a vote. *Id.* at 46. In 1888, Louisville, Kentucky became the first American city to adopt the Australian ballot, and in November 1889, Massachusetts was the first to use it statewide. *Id.* at 31, 36-39; Lepore, *supra.* New Hampshire has used the Australian ballot since 1891. Legislative History at 000062.

The Australian ballot drastically changed the utility of bribing voters because party workers could no longer monitor how voters voted. *See* Fredman, *supra*, at 47. Professor L.E. Fredman used the differences between the 1888 and 1892 presidential elections to highlight the effect. *See id.* at 83. Both elections featured Republican Benjamin Harrison against Democrat Grover Cleveland, but in the interim, 38 states had adopted the Australian ballot. *Id.* In 1888, the treasurer of the Republican National Committee instructed local officials: "Divide the floaters in blocks of five, and put a trusted man, with necessary funds, in charge of these five, and make them responsible that none get away." *Id.* at 22. Although the memorandum exposed the extent of bribery during that election, Benjamin Harrison was elected. In the 1892 election, by contrast, "[t]here seemed to be more factual argument and fewer noisy processions, and the day itself was generally quiet and orderly." *Id.* at 83; *see also* Stokes, *supra*, at 228 ("Historians also note the rising importance of party platforms in the late nineteenth century, another sign that vote buying was yielding to electoral strategies that, in [Theodore] Hoppen's

phrase, 'depended upon words.' ") (quoting Theodore K. Hoppen, *The Mid-Victorian Generation: 1846-1886* (2000)).

For the most part, the Australian ballot is credited with delivering "a blow against clientelism," Stokes, *supra*, at 241, and ending "direct bribery and intimidation." Fredman, *supra*, at 129; *see Burson*, 504 U.S. at 204 ("The success achieved through these reforms was immediately noticed and widely praised."). Nevertheless, although the Australian ballot drastically reduced incentives to resort to vote buying, it did not eradicate the phenomenon entirely. For example, in Adams County, Ohio, vote buying was able to persist due to the "relative smallness" of the area. *See* Fabrice Lehoucq, *When Does a Market for Votes Emerge?, in* Elections for Sale: The Causes and Consequences of Vote Buying 33, 38 (Frederic C. Schaffer ed., 2007). There, in 1910, the "price of a vote oscillated between a drink of whisky and US$25, with the average price being US$8 per vote. . . ." *Id.* (citing Genevieve B. Gist, *Progressive Reform in a Rural Community: The Adams County Vote-Fraud Case*, 48 Miss. Valley Historical Rev. 60, 62-63 (1961), http://www.jstor.org/stable/1902404). Similarly, due to rural populations with high poverty rates, "vote buying remained endemic well into the twentieth century" in many southern states. Stokes, *supra*, at 229.

Although "isolated and anachronistic," there continue to be some reports of vote buying in the twenty-first century. Stokes, *supra*, at 231. For example, there have been recent prosecutions for violations of federal vote-buying statutes in Kentucky, North Carolina, and

Illinois. *See United States v. Thomas*, 510 F.3d 714, 717 (7th Cir. 2007); *United States v. Shatley*, 448 F.3d 264, 265 (4th Cir. 2006); *United States v. Johnson*, No. 5:11-cr-143, 2012 WL 3610254, at *1 (E.D. Ky. Aug. 21, 2012); Stokes, *supra*, at 231. None of these cases, however, involved the use of a digital or photographic image of a marked ballot.

In addition to the introduction of the Australian ballot, anti-vote buying laws were a major cause of the decline of vote buying. *See* Allen Hicken, *How Do Rules and Institutions Encourage Vote Buying?, in* Elections for Sale: The Causes and Consequences of Vote Buying 47, 57 (Frederic C. Schaffer ed., 2007) (explaining that the strength of anti-vote buying rules "has the most direct impact on the expected utility of vote buying."). In the United States, federal law makes it a crime to buy votes or engage in voter coercion. *See* 52 U.S.C. § 10307(b) (voter intimidation, threats, and coercion prohibited); 52 U.S.C. § 10307(c) (vote buying in certain federal elections prohibited). New Hampshire law also prohibits vote buying and voter coercion. N.H. Rev. Stat. Ann. § 659:40, I ("No person shall directly or indirectly bribe any person not to register to vote or any voter not to vote or to vote for or against any question submitted to voters or to vote for or against any ticket or candidate for any office at any election."); N.H. Rev. Stat. Ann. § 659:40, II ("No person shall use or threaten force, violence, or any tactic of coercion or intimidation to knowingly induce or compel any other person to vote or refrain from voting, vote or refrain from voting for any particular candidate or ballot

measure, or refrain from registering to vote."); *see also* N.H. Rev. Stat. Ann. § 659:37 (voter interference prohibited); N.H. Rev. Stat. Ann. § 659:39 (giving liquor to voter to influence an election prohibited); N.H. Rev. Stat. Ann. § 659:40, III (voter suppression prohibited).

C. The Plaintiffs

The New Hampshire Attorney General's Office is currently investigating four individuals for alleged violations of RSA 659:35, I, including the three plaintiffs in this case. Doc. No. 18-1 at 9. The allegations concerning each of the plaintiffs arise from their votes in the September 9, 2014 Republican primary election, but the state does not contend that any of the plaintiffs were involved in vote buying. *See* Doc. No. 29 at 3.

Plaintiff Leon Rideout, who represents District 7 in Coos Country in the New Hampshire House of Representatives, voted in Lancaster, New Hampshire where he was on the ballot. Prior to casting his marked ballot, he took photographs of it with his phone. The ballot reflected that he voted for himself as well as other Republican candidates. Hours after he cast his ballot, he posted the photograph to Twitter with the text, "#COOS7 vote in primary 2014#nhpolitics." Doc. No. 18-1 at 9. He also posted the photograph to his House of Representatives Facebook page. In a September 11, 2014 article in the Nashua Telegraph, Rideout explained, "I did it to make a statement. . . . I think [RSA 659:35, I is] unconstitutional. . . . It's really just

an overreach of the government trying to control something that, in my opinion, doesn't need to be regulated." David Brooks, *You Didn't Take a Picture of Your Ballot Tuesday, Did You? (It's Illegal)*, Nashua Telegraph, Sept. 11, 2014, http://www.nashuatelegraph.com/news/1046026-469/you-didnt-take-a-picture-of-your.html. After Rideout posted the image, Paul Brodeur, an investigator from the Attorney General's Office, called him and requested an interview, which was conducted on September 16, 2014. The Attorney General's Office threatened to prosecute Rideout under RSA 659:35, I, but no complaint was served because the plaintiffs entered into agreements with the state to toll the statute of limitations period. Doc. No. 18-1 at 11.

The Attorney General's Office is also investigating Andrew Langlois, who voted in Berlin, New Hampshire. Because Langlois did not approve of his Republican choices for U.S. Senate, he wrote the name of his recently-deceased dog, "Akira," as a write-in candidate. He took a photograph of his ballot on his phone while in the ballot booth. He later posted the photograph on Facebook, writing in part, "Because all of the candidates SUCK, I did a write-in of Akira. . . ." Doc. No. 19-20 at 2. Brodeur called Langlois after the election and explained that he was being investigated for posting his ballot on social media. Because Langlois was unaware of RSA 659:35, I, he initially thought Brodeur's call was a "joke." Doc. No. 18-1 at 12.

Brandon Ross, the third plaintiff, voted in Manchester, where he was a candidate for the New Hampshire House of Representatives. With his phone, Ross

took a photograph of his marked ballot, which reflected his vote for himself and other Republican candidates. He took the picture to keep a record of his vote and to preserve the opportunity to show his marked ballot to friends. He was aware of RSA 659:35, I when he took the photograph, and he did not immediately publish it because of the law's penalties. After learning that the Attorney General's Office was investigating voters for violating RSA 659:35, I, on September 19, 2014, Ross posted the photograph of his marked ballot on Facebook with the text "Come at me, bro." Doc. No. 19-22 at 2. Representative Horrigan, the sponsor of the bill to amend RSA 659:35, filed an election law complaint, which triggered an investigation of Ross by the Attorney General's Office.

D. Procedural History

On October 31, 2014, Rideout, Langlois, and Ross filed a complaint pursuant to 42 U.S.C. § 1983 challenging the constitutionality of RSA 659:35. They requested declarations that the new law is facially unconstitutional and unconstitutional as applied to the plaintiffs. Doc. No. 1 at 20-21. They also sought an injunction to prohibit the state from enforcing RSA 659:35, I. *Id.* at 21.

On November 11, 2014, the plaintiffs filed a motion for a preliminary injunction. Ten days later, the parties agreed to an expedited discovery schedule in order to allow the issue to be decided on the merits rather than on a motion for a preliminary injunction. *See*

Fed. R. Civ. P. 65(a)(2) (authorizing court to consolidate preliminary injunction hearing and trial).

The parties have filed cross motions for summary judgment. *See* Doc. Nos. 18, 22. Both parties agree that there is no need for a trial because none of the material facts are in dispute.[6] Doc. No. 29 at 2.

II. STANDARD OF REVIEW

This case will be resolved on cross motions for summary judgment.

Summary judgment is appropriate when the record reveals "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The evidence submitted in support of the motion must be considered in the light most favorable to the nonmoving party, drawing all reasonable inferences in its favor. *See Navarro v. Pfizer Corp.*, 261 F.3d 90, 94 (1st Cir. 2001).

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[6] The plaintiffs argue that the new law is unconstitutional in all of its applications – and thus, is facially invalid – for the same reasons that it cannot be constitutionally applied to them. In response, the Secretary claims only that the plaintiffs' claims should be rejected because the new law can be constitutionally applied to everyone, including the plaintiffs. He does not argue that the law can be properly invoked in certain applications even if it cannot be constitutionally applied to the plaintiffs. Thus, I accept the plaintiffs' contention that this is an appropriate case for a facial challenge to the statute's constitutionality. *See United States v. Stevens*, 559 U.S. 460, 472-73 (2009) (describing standard for facial challenge based on First Amendment grounds).

A party seeking summary judgment must first identify the absence of any genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A material fact "is one 'that might affect the outcome of the suit under the governing law.'" *United States v. One Parcel of Real Prop. with Bldgs.*, 960 F.2d 200, 204 (1st Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). If the moving party satisfies this burden, the nonmoving party must then "produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it; if that party cannot produce such evidence, the motion must be granted." *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996); *see Celotex*, 477 U.S. at 323.

On cross motions for summary judgment, the standard of review is applied to each motion separately. *See Am. Home Assurance Co. v. AGM Marine Contractors, Inc.*, 467 F.3d 810, 812 (1st Cir. 2006); *see also Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 205 (1st Cir. 2006) ("The presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review."). Hence, I must determine "whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Adria Int'l Group, Inc. v. Ferré Dev., Inc.*, 241 F.3d 103, 107 (1st Cir. 2001).

III. ANALYSIS

Plaintiffs challenge only the portion of RSA 659:35, I that makes it unlawful for a voter to take and

disclose an image of his or her marked ballot. As they see it, this act of disclosure, which ordinarily occurs far from the polling place and will generally be accomplished through the use of social media, is an important and effective means of political expression that is protected by the First Amendment. In contrast, Secretary Gardner defends the law primarily by arguing that it is a necessary restraint on speech that is required to prevent vote buying and voter coercion.

The Supreme Court has developed a template for resolving conflicts between speech rights and governmental interests. Speech restrictions are first sorted by whether they are content based or content neutral. Content-based restrictions are subject to strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011)). Content-neutral restrictions, however, are subject only to intermediate scrutiny, meaning "the government may impose reasonable restrictions on the time, place, or manner of protected speech," so long as "'they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

I begin by determining whether the 2014 amendment to RSA 659:35, I is a content-based or content-neutral restriction on speech.

A. Content Neutrality

As the Supreme Court recently explained in *Reed v. Town of Gilbert*, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227. A law that distinguishes between permitted and prohibited speech based on the subject matter, function, or purpose of the speech is content based on its face. *Id.* Additionally, even a facially-neutral law will be deemed to be content based if it either cannot be justified without reference to the content of the speech or discriminates based on the speaker's point of view. *Id.*

A law that is content based on its face will be subject to strict scrutiny even though it does not favor one viewpoint over another and regardless of whether the legislature acted with benign motivations when it adopted the law. *See id.* at 2229-30. As the *Reed* court explained, "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 2229; *see also Turner Broad. Syst., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994) ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.").

In *Reed*, the Court applied these principles to invalidate a sign code that governed the manner in which people could display outdoor signs in Gilbert, Arizona. *Reed*, 135 S. Ct. at 2226. The sign code generally prohibited the display of outdoor signs anywhere within the town without a permit. It exempted twenty-three categories of signs from that requirement, but placed various lesser requirements on each of those twenty-three categories. For example, a political sign could be larger than a temporary directional sign and could be displayed for a longer amount of time. The Court held that the sign code was content based on its face because it treated each sign category differently dependent upon the type of content conveyed. *Id.* at 2227. Because the sign code was facially content based, the Court subjected it to strict scrutiny without attempting to identify the legislature's purpose or justification. *Id.*

In the present case, as in *Reed*, the law under review is content based on its face because it restricts speech on the basis of its subject matter. The only digital or photographic images that are barred by RSA 659:35, I are images of marked ballots that are intended to disclose how a voter has voted. Images of unmarked ballots and facsimile ballots may be shared with others without restriction. In fact, the law does not restrict any person from sharing any other kinds of images with anyone. In short, the law is plainly a content-based restriction on speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject

matter. Accordingly, like the sign code at issue in *Reed*, the law under review here is subject to strict scrutiny even though it does not discriminate based on viewpoint and regardless of whether the legislature acted with good intentions when it adopted the law.

The Secretary nevertheless contends that the new law should be exempt from strict scrutiny even if it is a content-based restriction on speech because it is only a partial ban on speech about how a voter has voted. In other words, because the new law leaves voters free to use other means to inform others about how they have voted, the Secretary argues that the law is merely a time, place, or manner restriction on speech that is subject only to intermediate scrutiny. This argument is a nonstarter. As the Supreme Court explained in *United States v. Playboy Entertainment Group, Inc.*, "[t]he distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." 529 U.S. 803, 812 (2000). Here, the law at issue is a content-based restriction on speech that deprives voters of one of their most powerful means of letting the world know how they voted. The legislature cannot avoid strict scrutiny when it adopts such a law merely by leaving voters with other arguably less effective means of speaking on the subject.

The Secretary also argues that the law should not be considered a content-based restriction on speech because paragraph II of RSA 659:35 additionally prohibits a voter from placing "a distinguishing mark upon

his or her ballot." *See* N.H. Rev. Stat. Ann. § 659:35, II. That is, because paragraph II prohibits another type of marking on ballots, the new law barring a voter from disclosing an image of a marked ballot is content neutral. This argument fails. The two paragraphs simply regulate two different categories of speech: paragraph I regulates a certain type of speech that ordinarily occurs outside the polling place and paragraph II regulates what types of markings a voter can make on a ballot while in the polling place. Because paragraph I regulates speech based on the content conveyed, paragraph II cannot save it from being a content-based restriction on speech.

In a last-ditch effort to save the law from strict scrutiny, the Secretary argues that completed ballots are a form of government speech and thus do not trigger First Amendment protection at all. He cites *Walker v. Texas Division, Sons of Confederate Veterans*, which held that Texas's specialty license plate designs constituted government speech and thus Texas was entitled to refuse to issue plates featuring a group's proposed design. 135 S. Ct. at 2253. In reaching its decision, the Court in *Walker* relied on the facts that (1) license plates "long have communicated messages from the States," (2) Texas license plate designs "are often closely identified in the public mind with the State," and (3) Texas maintains direct control over the messages conveyed on its specialty plates. *Id.* at 2248-49 (internal quotations and alterations omitted). The problem at issue here, however, is quite different from the problem the Court resolved in *Walker*. First, ballots

do not communicate messages from the state; they simply list slates of candidates. Second, although blank ballots may be identified with the state, there is no possibility that a voter's marking on a ballot will be misinterpreted as state speech. Third, New Hampshire does not maintain direct control over the messages that people convey on ballots, apart from the restriction that they place no distinguishing mark on their ballot. *See* N.H. Rev. Stat. Ann. § 659:35, II. Accordingly, any markings that voters place on their ballots clearly do not qualify as government speech.

Although the Secretary does not press the point, Representative Horrigan also suggested during debate on the new law that it could be justified because it regulates speech at the polling place where electioneering is not permitted. I disagree. RSA 659:35, I does not bar voters from taking pictures of their completed ballots before they are cast. What they may not do is disclose images of a completed ballot to others. Because disclosure will generally take place far away from the polling place, the Secretary cannot prevent the new law from being subject to strict scrutiny by claiming that it is merely a restriction on speech in a nonpublic forum, where speech rights are more limited. *See e.g.*, *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment) (arguing that viewpoint-neutral restrictions on speech in the vicinity of polling places should not be subject to strict scrutiny because they restrict speech in what is traditionally a nonpublic forum).

For similar reasons, a law that restricts a person's ability to tell others how he has voted is not exempt from strict scrutiny merely because the ballot itself is a nonpublic forum. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression"). The law at issue here does not restrict what a voter may write on his ballot; it regulates the way in which he can disclose his vote to others. Thus, the nonpublic forum doctrine cannot be invoked to save the law from strict scrutiny because the speech that the law restricts necessarily occurs in forums that the government does not own or control. To illustrate the point, consider a law that bans public discussion of what is said at a candidate debate held by a public broadcaster. Is there any doubt that such a law would be subject to strict scrutiny even though the Supreme Court has held that the debate itself occurs in a nonpublic forum? *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998) (debate conducted by a public broadcaster is a nonpublic forum). Obviously not. For the same reasons, the law at issue here is not exempt from strict scrutiny merely because the ballot itself is a nonpublic forum.

B. Strict Scrutiny

Because the 2014 amendment to RSA 659:35, I is a content-based restriction on speech, it can stand only if it survives strict scrutiny, " 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve

that interest.'" *Reed*, 135 S. Ct. at 2231 (quoting *Ariz. Free Enter.*, 131 S. Ct. at 2817). The Secretary bears the burden of establishing both requirements. *See id.* As I explain below, he has failed to meet his burden on either part of the strict scrutiny test.

1. State Interests

The Secretary argues that a ban on displays of completed ballots serves the state's compelling interest in preventing vote buying and voter coercion.[7] While both interests are plainly compelling in the abstract, the mere assertion of such interests cannot sustain a content-based speech restriction.

For an interest to be sufficiently compelling, the state must demonstrate that it addresses an actual problem. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct.

[7] In his brief, the Secretary characterized the state's interests in three different ways, apparently dependent upon which level of scrutiny applies. First, asserting that the law is content neutral, he argued that the law furthers "the *important* governmental interest of ensuring the purity and integrity of our elections." Doc. No. 22-1 at 2 (emphasis added). Second, applying the standard for content-neutral restrictions on speech, the Secretary identified the state's "*significant* interest in thwarting one party's ability to confirm how another party has voted thereby making it impossible for a party purchasing a vote to visually confirm the vote that is being purchased." *Id.* at 8 (emphasis added). Finally, he argued that even if strict scrutiny applies, "preventing voter intimidation and election fraud is a *compelling* interest." *Id.* at 14 (emphasis added). Collectively, these three characterizations address two interests: preventing vote buying and preventing voter coercion. I treat these two interests as the government's asserted interests.

2729, 2738 (2011) ("The state must specifically identify an 'actual problem' in need of solving. . . ." (quoting *Playboy*, 529 U.S. at 822-23)); *see also Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla*, 490 F.3d 1, 18 (1st Cir. 2007) ("We cannot conclude that [the Puerto Rico Department of Consumer Affairs] has a legitimate state interest in fixing a problem it has not shown to exist."). To satisfy this requirement, the government ordinarily must point to sufficient evidence in the law's legislative history or in the record before the court to show that the problem exists. *See Turner*, 512 U.S. at 667 (explaining that without evidence of an actual problem, "we cannot determine whether the threat [asserted by the government] is real enough" to survive strict scrutiny). "Anecdote and supposition" cannot substitute for evidence of a real problem. *Playboy*, 529 U.S. at 822; *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest.").

In the present case, neither the legislative history nor the evidentiary record compiled by the Secretary in defense of this action provide any support for the view that the state has an actual or imminent problem with images of completed ballots being used to facilitate either vote buying or voter coercion. The law's legislative history contains only a single unsubstantiated third-hand report that vote buying occurred in Goffstown during the 2012 election. *See* Legislative History at 000064. Although the Secretary was given

the opportunity to do so,[8] he produced no evidence that either vote buying or voter coercion are current problems in New Hampshire. Plaintiffs, in contrast, have produced undisputed evidence that there have been no vote buying prosecutions and no complaints of vote buying in the state since at least 1976. Exhibit B at 11. More to the point, even though small cameras capable of taking photographic images of ballots have been available for decades and cell phones equipped with digital cameras have been in use for nearly 15 years, the Secretary has failed to identify a single instance anywhere in the United States in which a credible claim has been made that digital or photographic images of completed ballots have been used to facilitate vote buying or voter coercion. Although legislatures are entitled to deference when making predictive judgments,[9] deference cannot be blind to the complete absence of evidence when speech restrictions are at issue.

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[8] I invited both parties to present additional information and have given them every opportunity to come forward with any evidence they have. Both parties agreed that a trial was unnecessary and that the case should be decided on cross motions for summary judgment. Doc. No. 29 at 2.

[9] The degree of deference that must be accorded to legislative judgments in First Amendment cases will vary based on a variety of circumstances. In *Turner Broadcasting System, Inc. v. FCC*, the Court deferred to Congress's predictive judgment that the law under review furthered important governmental interests. 520 U.S. 180, 185 (1997). In that case, however, the challenged law was a content-neutral restriction on speech, the legislative judgment concerned a complex regulatory regime in an area undergoing rapid technological change, and the proposed law was based on years of testimony and volumes of documentary evidence. *Id.* at 196, 199. The law at issue here is very different because it is a

Here, the Secretary offers only anecdote and speculation to sustain the law, which is insufficient when it is applied to a content-based restriction on speech.

The Secretary invokes the Supreme Court's plurality decision in *Burson v. Freeman* to support his claim that content-based speech restrictions can be justified without evidence that compelling state interests are under actual threat. There, the statute under review established a buffer zone around polling places to protect voters from solicitation and the distribution of campaign materials. *Burson*, 504 U.S. at 193-94 (plurality opinion). In sustaining the statute against a First Amendment challenge, the plurality relied heavily on historical evidence demonstrating that predecessor statutes to the one under review had been adopted long ago to respond to a situation in which "[a]pproaching the polling place . . . was akin to entering an open auction place." *Id.* at 202. The Court concluded that it was appropriate for the state to act without evidence of a current problem in part because the "long, uninterrupted and prevalent" use of similar statutes throughout the United States made it difficult for the state to determine what would happen if the challenged law were invalidated. *Id.* at 208.

Burson, however, is a very different case from the one I decide today. In contrast to the statute at issue in *Burson*, the 2014 amendment to RSA 659:35, I is quite

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content-based restriction on speech, the law does not address a complex regulatory problem, and the legislative judgment is not based on evidence concerning the existence of the alleged problem.

new and cannot be tied to historical evidence of recent vote fraud. Although it is true that vote buying was a problem in this country before the adoption of the Australian ballot, the historical record establishes that vote buying has not been a significant factor in elections in more than 100 years. Further, because the law at issue here is new and the technology it targets has been in use for many years, it is reasonable to expect that if the problem the state fears were real, it would be able to point to some evidence that the problem currently exists. Under these circumstances, both history and common sense undermine rather than support the state's contention that vote buying and voter coercion will occur if the state is not permitted to bar voters from displaying images of their completed ballots.

Because the Secretary has failed to demonstrate that the law serves a compelling state interest, it fails to satisfy strict scrutiny.

2. Narrow Tailoring

Even if the Secretary had proved that the new law serves a compelling interest, it would still fail the strict scrutiny test because it is not narrowly tailored to address the alleged state interests.

When the government attempts to restrict speech in order to further a state interest, it ordinarily must demonstrate that the restriction "'is narrowly tailored to achieve that interest.'" *Reed*, 135 S. Ct. at 2231 (quoting *Ariz. Free Enter.*, 131 S. Ct. at 2817). Even content-neutral restrictions require narrow tailoring

because "silencing speech is sometimes the path of least resistance . . . [and] by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). This tailoring requirement is even more demanding when the state elects to restrict speech based on its content. In such cases, the burden is on the state to demonstrate that the restriction it has adopted is the "least restrictive means" available to achieve the stated objective. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2014); *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (dictum); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 505 (1st Cir. 1989); *but cf. Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015) (narrow tailoring does not require perfect tailoring even when a content-based speech restriction is under review).

Among other reasons, a law is not narrowly tailored if it is significantly overinclusive. *See Brown*, 131 S. Ct. at 2741; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121, 123 (1991); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794-95 (1978). For example, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, the law at issue required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account and made available to the victims of the crime and the criminal's other creditors. 502 U.S. at 108. The Supreme Court

held that the law was a "significantly overinclusive" means of ensuring that victims are compensated from the proceeds of crime, and therefore the law was not narrowly tailored. *Id.* at 121, 123. Describing the reach of the statute, the Court stated:

> Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen . . . a nearly worthless item as a youthful prank, the [government entity] would control his entire income from the book for five years, and would make that income available to all of the author's creditors. . . .

Id. at 123. That is, the statute applied to a wide range of literature that would not enable a criminal to profit while a victim remained uncompensated. Because the law covered far more material than necessary to accomplish its goals, the Court held that the statute was vastly overinclusive and therefore not narrowly tailored. *Id.*

Here, like the law at issue in *Simon & Schuster*, the 2014 amendment to RSA 659:35, I is vastly overinclusive and is therefore not narrowly tailored to further a compelling interest. Even if the Secretary could demonstrate that New Hampshire has an actual problem with either vote buying or voter coercion and that allowing voters to display images of their ballots would exacerbate either problem, the means that the state has chosen to address the issue will, for the most part, punish only the innocent while leaving actual participants in vote buying and voter coercion schemes

unscathed. As the complaints of the voters who are now under investigation reveal, the people who are most likely to be ensnared by the new law are those who wish to use images of their completed ballots to make a political point. The few who might be drawn into efforts to buy or coerce their votes are highly unlikely to broadcast their intentions via social media given the criminal nature of the schemes in which they have become involved. As a result, investigative efforts will naturally tend to focus on the low-hanging fruit of innocent voters who simply want the world to know how they have voted for entirely legitimate reasons. When content-based speech restrictions target vast amounts of protected political speech in an effort to address a tiny subset of speech that presents a problem, the speech restriction simply cannot stand if other less restrictive alternatives exist.

Because the 2014 amendment is a content-based restriction on speech, it falls to the government to demonstrate that less speech-restrictive alternatives will not work. *Playboy*, 529 U.S. at 816. In the present case, the state has an obviously less restrictive way to address any concern that images of completed ballots will be used to facilitate vote buying and voter coercion: it can simply make it unlawful to use an image of a completed ballot in connection with vote buying and voter coercion schemes. The Secretary has failed to explain why this alternative would be less effective. At most, he has offered a generalized complaint that vote buying and voter coercion are difficult to detect. This

explanation, however, merely highlights the ineffectiveness of the approach to the problem that the legislature has adopted. Vote buying and voter coercion will be no less difficult to detect if the statute remains in effect because people engaged in vote buying and voter coercion will not publicly broadcast their actions via social media. Accordingly, rather than demonstrating that alternatives would be ineffective, the Secretary's response only demonstrates the ineffectiveness of the law at issue.

Because the 2014 amendment to RSA 659:35, I is vastly overinclusive and the Secretary has failed to demonstrate that less speech-restrictive alternatives will be ineffective to address the state's concerns, it cannot stand to the extent that it bars voters from disclosing images of their completed ballots.

IV. CONCLUSION

The Supreme Court requires lower courts to use a categorical approach when resolving First Amendment problems of the type at issue here. Thus, the viability of a challenged statute will turn on questions such as whether the statute is "content based," whether it serves "compelling governmental interests," and whether it is "narrowly tailored" to achieve those interests. I have followed this approach in concluding that the new law is a content-based restriction on speech that cannot survive strict scrutiny because it neither actually serves compelling state interests nor is it narrowly tailored to achieve those interests.

One sitting Supreme Court Justice has called for the lines between constitutional categories to be softened to permit judges to address the competing interests that underlie disputes such as the one at issue here more directly and with greater flexibility. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (Breyer, J., concurring) ("The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit.") Although there are sound policy reasons to allow judges greater flexibility when analyzing First Amendment questions, I would not come to a different conclusion in this case even if I were free to more directly balance the interests that are at stake here. At its core, this dispute turns on a claim that the political speech rights of voters must be curtailed to protect the vote against those who would corrupt it with cash and coercion. If this claim could be grounded in something other than speculation, it would be more difficult to resolve because few, if any, rights are more vital to a well-functioning democracy than either the right to speak out on political issues or the right to vote free from coercion and improper influence. But the record in this case simply will not support a claim that these two interests are in irreconcilable conflict. Neither the legislative history of the new law nor the evidentiary record compiled by the parties provide support for the view that voters will be either induced to sell their votes or subjected to coercion if they are permitted to disclose images of their ballots to others.

Nor is there any reason to believe that other less restrictive means could not be used to address either problem at least as effectively as the massively overinclusive law that is at issue here. Accordingly, this case does not present the type of conflict between speech rights and other governmental interests that can be used to justify a law that restricts political speech.

Although the plaintiffs have sought both declaratory and injunctive relief, I have no reason to believe that the Secretary will fail to respect this Court's ruling that the new law is unconstitutional on its face. Accordingly, I grant the plaintiffs' request for declaratory relief but determine that injunctive relief is not necessary at the present time. *See Wooley v. Maynard*, 430 U.S. 705, 711 (1997) (injunctive relief is not required if the plaintiffs' interests will be protected by a declaratory judgment). The plaintiffs' motion for summary judgment (Doc. No. 18) is granted to the extent that it seeks a judgment for declaratory relief, and the Secretary's corresponding motion (Doc. No. 22) is denied. The clerk shall enter judgment for the plaintiffs.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

August 11, 2015

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