No. 16-828

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 LANGLOIS, AND BRANDON D. ROSS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Circuit properly affirmed the district court's finding that New Hampshire's so-called "ballot selfie" ban—which prohibits a person from publishing on online social media platforms a photograph of his or her marked ballot reflecting "how he or she has voted"—violates the First Amendment because it censors innocent political speech wholly unrelated to the vote buying and voter coercion criminal activity that it aims to address?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, none of the Respondents filing the Brief in Opposition has a parent corporation or issues stock.

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INTRODUCTION

New Hampshire petitions this Court for certiorari review of the decision of the United States Court of Appeals for the First Circuit holding that House Bill 366 ("HB 366")—New Hampshire's 2014 so-called "ballot selfie" ban—violates the First Amendment. The court of appeals unanimously held that the law censors innocent political speech wholly unrelated to the vote buying and voter coercion criminal activity that it purports to address. The law makes it a violation-level offense to post online a photograph of one's own marked ballot weeks, months, or years after an election has concluded, and—as the facts of this case illustrate—even where the posting is a form of core political expression that has nothing to do with vote buying or voter coercion. This is not a close case. As the First Circuit concluded, HB 366 is not only contrary to basic First Amendment principles, but it is "antithetical to democratic values." App. 15 n.6.[1]

Supreme Court review of HB 366 is unwarranted. There is no circuit split. No other court of appeals has ruled on the merits of a constitutional challenge to another ballot selfie ban. There are four other pending cases—in Indiana, Colorado, New York, and Michigan—addressing such bans. None of these cases has resulted in a final adjudication at the appellate level. Thus, there is no disagreement among the courts of appeals, and this issue will receive further consideration by lower courts in due course. There is no reason for this Court to take up the matter prematurely.

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[1] "App." refers to the appendix to Petitioner's Petition for Writ of Certiorari and page number.

This case would also be a poor vehicle to decide the constitutionality of ballot selfie bans in the United States, as New Hampshire's law is unusual. Some 16 states have decades-old, pre-Internet laws on the books that arguably ban this form of online speech. *See* District Court Record, at Docket No. 19-5.[2] But the New Hampshire law is not representative of these state restrictions because it is a new development, without any historical precedent. Unlike the 100-foot electioneering buffer zone around polling places upheld in *Burson v. Freeman*, 504 U.S. 191 (1992), HB 366 is specifically crafted to target online speech untethered to the polling place on Election Day. Indeed, with HB 366's passage in 2014, New Hampshire became the first state in the country to update its decades-old election laws during the Internet age with the specific intent to ban this form of online political speech.[3]

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[2] Several states have also recently repealed or amended their laws in order to allow this form of online speech in recognition of its protected status under the First Amendment. App. 20-21 n.10 (noting that California, Arizona, Utah, Oregon, Maine, and Rhode Island have all modified or reinterpreted their laws to permit this speech).

[3] On July 1, 2015, Indiana became the second state to adopt such a ban. *See* Ind. Code § 3-11-8-17.5(a)-(b); *see also Ind. Civ. Liberties Union Found. Inc. v. Ind. Sec'y of State*, No. 1:15-cv-01356-SEB-DML, 2017 U.S. Dist. LEXIS 8025, at *1-2 (S.D. Ind. Jan. 19, 2017).

STATEMENT OF THE CASE

A. HB 366

Effective September 1, 2014, New Hampshire enacted HB 366, which amended N.H. Rev. Stat. Ann. ("RSA") § 659:35(I) to state the following: "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**." *See* H.B. 366, 2014 Sess. (N.H. 2014) (enacted) (bolded language reflects the modifications that became effective on September 1, 2014). A willful violation of this statute is a violation-level offense punishable by a fine not to exceed $1,000. RSA 659:35(IV); 651:2(IV)(a).

Under the prior version of RSA 659:35(I), it was unlawful to display one's marked ballot only where it reflected how one was "about to vote." App. 4. As a result, the prior law burdened speech only on Election Day inside the polling place between the moment a voter marked the ballot and the moment the voter placed the ballot in the ballot box. This law dates back to the early 1890s, and was codified as RSA 659:35(I) in 1979. App. 4.

HB 366's amendment to RSA 659:35(I) substantially expanded this prohibition and specifically targeted speech—namely, the online photographic publication of a marked ballot—untethered to the polling place or Election Day itself.

B. HB 366'S LEGISLATIVE HISTORY

In January 2013, New Hampshire Democratic Representative Timothy Horrigan introduced the original version of HB 366. App. 23. Representative Horrigan explained 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 in a particular way." App. 4-5, 24.

The Election Law Committee and the Criminal Justice and Public Safety Committee (the "Criminal Justice Committee") of the New Hampshire House of Representatives both recommended the bill's passage. The Criminal Justice Committee's review, however, occasioned substantial dissent regarding the bill's restrictions on speech. That Committee rejected, by a vote of 10 to 5, a proposal to limit HB 366's prohibitions so that they would apply "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." App. 3, 26-27. When a majority of the Criminal Justice Committee recommended that HB 366 "ought to pass" without any such saving amendment, six Committee members drafted a "minority committee report" objecting that the bill was "overly broad" because it would ban innocent political speech. App. 5, 26-27.

The bill passed the full House of Representatives by a vote of 198 to 96. App. 6, 28.

In the New Hampshire Senate, the bill was first considered by the Senate Public and Municipal Affairs Committee. App. 6. New Hampshire Deputy Secretary of State David M. Scanlan testified that HB 366 was

necessary to update the law in light of modern technology to address vote buying. App. 27. Representative Horrigan testified similarly that "new high tech methods of showing a ballot absolutely could be used to further a serious vote-buying scheme." App. 28. New Hampshire Representative Mary Till, a member of the House Election Law Committee, also testified in favor of HB 366, arguing that the law would help ensure that "no one is coerced to vote in a particular way." App. 28.

On April 17, 2014, the Committee recommended that the bill "ought to pass" the Senate. The full Senate then passed the bill by voice vote. App. 28. Then-Governor Maggie Hassan signed HB 366 into law on June 11, 2014. HB 366 went into effect on September 1, 2014. App. 28.

C. THE ABSENCE OF EVIDENCE OF VOTE BUYING AND VOTER COERCION

Despite New Hampshire's contention that, "[w]ith recent advances in technology, one's right to vote freely without fear of retaliation is in jeopardy," *see* Pet. at 7, the State has presented no evidence that vote buying or voter coercion has occurred in New Hampshire since the late 1800s, let alone shown that a photograph of a marked ballot has ever been displayed online in furtherance of a crime. App. 30. The Secretary of State has admitted that he has not received a complaint or concern regarding a voter displaying a photograph of his or her marked ballot to a person buying or coercing the vote in New Hampshire from 1976—the year he entered the office—to the present. Nor does his Office recall any specific incidents of vote

buying or voter coercion from 1976 to the present. App. 14.

Thus, as the First Circuit accurately explained, HB 366 "does not respond to a present 'actual problem' in need of solving." App. 13 (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011)). The State has advanced only "an unsubstantiated and hypothetical danger." App. 21.

D. ENFORCEMENT OF HB 366

Between September 1, 2014 (when HB 366 became effective) and August 11, 2015 (when the district court declared HB 366 unconstitutional), the New Hampshire Attorney General's Office actively investigated individuals who posted their marked ballots on the Internet, regardless of whether the postings were related to the State's asserted interests in combatting vote buying and voter coercion. As of August 11, 2015, the State was investigating four individuals for alleged violations of HB 366, including the three Respondents in this case. The Respondents have entered into agreements with the State to toll the three-month statute of limitations period pending the outcome of this lawsuit. *See* RSA 625:8(I)(d) (three-month statute of limitations for violation-level offense).

Respondent Leon Rideout. Respondent Leon H. Rideout is a former member of the New Hampshire House of Representatives, having represented District 7 in Coos County from January 2013 to January 2017. He is a 26-year veteran of the U.S. Marine Corps. who served in both Operation Desert Shield/Desert Storm and the Iraq War. He is also a member of the Board of

Selectmen for Lancaster, New Hampshire. App. 7-8, 35-36.

Representative Rideout voted during the September 9, 2014 Republican primary election in Lancaster, where he was on the ballot. During that election, he took a photograph of his marked ballot with his phone in the poll booth prior to casting the ballot. The marked ballot reflected that he voted for himself as well as other Republican candidates. Hours after the ballot was cast, Representative Rideout posted the photograph on Twitter, along with the text "#COOS7 vote in primary 2014#nhpolitics." He also posted the photograph to his House of Representatives Facebook page. App. 7-8, 35-36.

In a September 11, 2014 *Nashua Telegraph* article, Representative Rideout explained: "I did it to make a statement …. I had promised a few other [representatives] that I would post my ballot, and I did …. I think [HB 366 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." App. 7-8, 35-36. It is undisputed that Representative Rideout's posting had nothing to do with vote buying or voter coercion.

The same day the *Nashua Telegraph* article was published, the Secretary of State's Office sent an email to the New Hampshire Attorney General's Office linking to the article and Representative Rideout's Facebook page containing the ballot photograph. The Attorney General's Office then initiated an investigation of Representative Rideout for violating HB 366.

Paul Brodeur, an investigator from the Attorney General's Office, called Representative Rideout and requested an interview. The interview was conducted on September 16, 2014. During the interview, Representative Rideout admitted that he published a photograph of his marked ballot on the Internet. App. 36.

Days after the filing of this lawsuit on October 31, 2014, the Attorney General's Office threatened Representative Rideout with prosecution under RSA 659:35(I) and prepared a complaint to be served in light of the three-month statute of limitations period. No complaint was formally filed and served because Representative Rideout and the other Respondents in this case entered into agreements with the State to toll the statute of limitations period for the duration of this litigation. App. 36.

Respondent Andrew Langlois. Respondent Andrew Langlois voted during the September 9, 2014 Republican primary election in Berlin, New Hampshire. Because Mr. Langlois did not approve of his Republican choices for United States Senate, he wrote the name "Akira" as a write-in candidate. "Akira" is the name of Mr. Langlois's dog who had died just days before the primary election. Prior to casting the marked ballot, Mr. Langlois took a photograph of the ballot's Senate section with his phone while in the ballot booth. He then went home and posted the photograph on Facebook, along with commentary reflecting his frustration with his Republican choices for Senate. The commentary stated, in part: "Because all of the candidates SUCK, I did a write-in of Akira (my now decease[d dog] …." App. 8, 36. Langlois

posted the photo and text as a form of political protest of his candidate choices. It is undisputed that Mr. Langlois's posting had nothing to do with vote buying or voter coercion.

After the primary election, Mr. Langlois received a phone call from Paul Brodeur, an investigator with the New Hampshire Attorney General's Office. Mr. Brodeur explained that Mr. Langlois was being investigated for posting his ballot on social media in violation of RSA 659:35(I). At first, Mr. Langlois was surprised that what he did was illegal. He told Mr. Brodeur that the phone call must be some sort of "joke." App. 8, 36. This investigation is pending the outcome of this litigation.

Respondent Brandon D. Ross. Respondent Brandon D. Ross voted during the September 9, 2014 Republican primary election in Manchester, New Hampshire. Mr. Ross was a candidate on the ballot at the time, seeking to be one of two Republican nominees to represent Hillsborough County District 42's two seats in the New Hampshire House of Representatives. After Mr. Ross marked his ballot with his choices and prior to depositing the ballot, he took a photograph of the ballot with his phone. His marked ballot reflected that he was voting for himself, as well as other Republican candidates. Mr. Ross took this picture to keep a record of his vote, to assist him in the future with remembering other candidates for whom he voted, and to preserve the opportunity to show his marked ballot to others as a means of demonstrating his support for certain political candidates. Mr. Ross was aware of HB 366 when he took this photograph, but he

did not immediately publish the photograph because of the law's penalties. App. 8-9, 36-37.

Over one week later, Mr. Ross became aware that the New Hampshire Attorney General's Office was investigating voters for violating HB 366. In response, on September 19, 2014, Mr. Ross posted the photograph of his marked ballot on Facebook with the text "Come at me bro." App. 8-9, 36-37. The text expressed his political objection to HB 366 on free speech grounds and his concern about the Attorney General's investigations of legitimate voters. It is undisputed that Mr. Ross's posting had nothing to do with vote buying or voter coercion.

Mr. Ross is currently being investigated by the Attorney General's Office for his posting. This investigation was triggered by a complaint filed by the sponsor of HB 366, Democratic Representative Timothy Horrigan, on October 2, 2014. App. 8-9, 36-37. The investigation is pending the outcome of this litigation.

E. PROCEDURAL HISTORY

After the New Hampshire Attorney General's Office commenced investigations of Respondents, Respondents filed a civil action in the U.S. District Court for the District of New Hampshire on October 31, 2014, seeking a declaration that HB 366 violates the First Amendment. App. 9, 37.

The parties filed cross motions for summary judgment. On August 11, 2015, the district court issued a 42-page Memorandum and Order declaring that HB 366's amendment to RSA 659:35(I) violates the First Amendment. The district court ruled that the law was content based, thereby triggering strict scrutiny

review. App. 22-57. Applying strict scrutiny, the district court held that HB 366 was not narrowly tailored to serve a compelling governmental interest. App. 51-55. The court concluded: "Because [HB 366] 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." App. 55.

On September 28, 2016, the U.S. Court of Appeals for the First Circuit affirmed the district court's decision in a 22-page opinion, though "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." App. 3, 12 n.4.

The court of appeals concluded that "the restrictions on speech imposed by this amendment are antithetical to democratic values." App. 15 n.6. As the court explained: "The restriction affects voters who are engaged in core political speech, an area highly protected by the First Amendment …. Ballot selfies have taken on a special communicative value: they both express support for a candidate and communicate that the voter has in fact given his or her vote to that candidate." App. 20. The court added: "New Hampshire may not impose such a broad restriction on speech banning ballot selfies in order to combat an unsubstantiated and hypothetical danger. We repeat the old adage: 'a picture is worth a thousand words.'" App. 21.

The court of appeals further determined that the law was vastly overbroad:

> 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 …. 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.

App. 17. In short, New Hampshire's ballot selfie ban, the court reasoned, "is like burning down the house to roast a pig." App. 19 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Because the court concluded that "the statute fails even intermediate scrutiny," it determined that "we need not resolve the question of whether section 659:35(I) is a content-based regulation." App. 12 n.4.

REASONS FOR DENYING THE PETITION

Supreme Court review of HB 366 is unwarranted. There is no circuit split. The First Circuit's decision is the first—and so far the only—court of appeals decision addressing the constitutionality of a so-called "ballot selfie" ban on a full evidentiary record. There are currently four other pending cases addressing ballot selfie bans. But none of these cases has resulted in a final adjudication at the appellate level.

Moreover, this is not a close case. The facial unconstitutionality of HB 366 is, as four judges in this

case have explained, obvious given the law's sweeping overbreadth.

Nor is the First Circuit's opinion inconsistent with this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), which upheld a 100-foot electioneering buffer zone around a polling place on Election Day. As the lower courts in this case correctly found, this law is easily distinguishable. While the restriction in *Burson* was carefully limited to speech in the immediate environs of polling places and only on Election Day, HB 366 imposes a "much greater" limitation on speech extending far beyond polling places or Election Day. App. 16. As the First Circuit noted, HB 366 "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." *Id.*

Accordingly, the petition should be denied.

I. THERE IS NO CIRCUIT SPLIT REQUIRING THIS COURT'S INTERVENTION.

There is no circuit split requiring this Court's intervention. *See* Sup. Ct. R. 10(a). No other court of appeals has yet addressed the constitutionality of a "ballot selfie" ban on the merits.

Moreover, the matter is under consideraion by numerous lower courts. There are four pending cases addressing ballot selfie bans in Indiana, Colorado, New York, and Michigan. This issue is plainly evolving, and not yet ripe for this Court's review.

On January 19, 2017, the United States District Court for the Southern District of Indiana issued a

permanent injunction barring Indiana from enforcing its 2015 ballot selfie ban. *Ind. Civ. Liberties Union Found. Inc. v. Ind. Sec'y of State*, No. 1:15-cv-01356-SEB-DML, 2017 U.S. Dist. LEXIS 8025 (S.D. Ind. Jan. 19, 2017). This order followed the issuance of a preliminary injunction on October 19, 2015. *See* 2015 U.S. Dist. LEXIS 182116, at *1 (S.D. Ind. Oct. 19, 2015). This law prohibits voters from taking photographs of their ballots while in a polling place and bars them from distributing any such photographs "using social media or by any other means." 2017 U.S. Dist. LEXIS 8025, at *2. Concluding that the law was content-based and applying strict scrutiny, the district court explained that it failed narrow tailoring "because it extends far beyond the targeted speech in attempting to prevent vote buying." *Id.* at *16. Citing the First Circuit's decision, the district court added that, "even if the statute had imposed a content-neutral restriction on speech, it would nevertheless be unconstitutional." *Id.* at *19-20. On February 20, 2017, the State filed a notice of appeal seeking review before the Seventh Circuit.

In the Colorado case, plaintiffs challenged a law, first enacted in 1891 and amended in 1980, which prohibited a person from "show[ing] his ballot after it is prepared for voting to any person in such a way as to reveal its contents." *Hill v. Williams*, No. 16-cv-02627-CMA, 2016 U.S. Dist. LEXIS 155460, at *3 (D. Colo. Nov. 4, 2016). The district court issued a preliminary injunction barring the State from enforcing this law unless publication of a marked ballot is in connection with violations of other criminal laws. *Id.* at *35-36. The district court concluded that the State's admission that it would not prosecute someone for posting a

"ballot selfie" in the absence of other criminal activity established that this speech, by itself, "pose[s] no material public concern" that would justify its prohibition. *Id.* at *32. The court added that "the legislature has passed other laws that address the governmental interest in question [vote buying and voter intimidation] and do so in a constitutional manner." *Id.* The State filed a notice of appeal to the Tenth Circuit. Proceedings before the district court and Tenth Circuit have been stayed pending legislative efforts to amend the challenged Colorado law to permit voters to engage in this form of speech.

In New York, the district court declined to issue a preliminary injunction against a state law from the late 1800s that barred a person from "[s]how[ing] his ballot after it is prepared for voting, to any person so as to reveal the contents." *Silberberg v. Bd. of Elections of N.Y.*, No. 16-cv-8336 (PKC), 2016 U.S. Dist. LEXIS 152784, at *2 (S.D.N.Y. Nov. 3, 2016). The court's denial was based on its conclusion that issuing an injunction so close to the 2016 general election "would seriously disrupt the election process." *Id.* at *20. The district court acknowledged in a footnote that its review of the statute was incomplete, noting that "[t]he present expedited posture of this preliminary injunction motion does not require the Court to consider whether the challenged statute would likely pass muster under a strict scrutiny analysis applicable to a public forum." *Id.* at *12 n.3. The district court also explained that the New York law in question is distinguishable from the enjoined New Hampshire and Indiana laws because these laws were "recently enacted" and "specifically targeted ballot selfies" as opposed to "longstanding bans on displaying marked

ballots." *Id.* at *15. Proceedings before the district court are ongoing.

In Michigan, the district court preliminarily enjoined enforcement of an 1891 state law banning a voter from "show[ing] his or her ballot … to any person other than a person lawfully assisting him or her," as well as the state's policy of banning the use of cell phones in the polling place. The Sixth Circuit subsequently stayed the preliminary injunction given the imminence of the 2016 general election. *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016). As the court of appeals explained:

> To be clear, we are not resolving the merits of the case. Lingering issues remain, some of which may require evidence, including the interrelation of this ban with other Michigan voting procedures, including the use of mail-in ballots. There will be time enough for that after the election. So far, the district court has not held a hearing, and as a result has not made any factual findings. …. [The plaintiff] will be able to pursue his claim after the election, when there will be time for due deliberation in the district court and our court.

Id. at 401. Moreover, the Sixth Circuit noted that the Michigan ban was different from the New Hampshire and Indiana bans that were enjoined. *Id.* Unlike the Michigan law which originated from 1891, the New Hampshire and Indiana bans were "targeted at ballot selfies, not general bans on ballot-exposure and photography at the polls." *Id*. Proceedings before the district court are ongoing.

Given that none of these four cases has resulted in final adjudication on the merits at the appellate level, this Court can and should wait to address the constitutionality of ballot selfie bans until the lower appellate courts have fully considered this issue and there is a conflict among them that needs resolving. Indeed, this Court has "in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsberg, J., dissenting); *see also California v. Carney*, 471 U.S. 386, 400–01 (1985) (Stevens, J., dissenting) ("To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.").

II. THE FIRST CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENT.

Given the absence of a circuit split, Petitioner contends that the First Circuit's decision presents an important question of federal law that should be settled by this Court. *See* Sup. Ct. R. 10(c). But where, as here, there is no conflict among the circuits, there is no need for this Court to exercise review. As the First Circuit and the district court held, HB 366 is unconstitutional because it "reaches and curtails the speech rights of all voters, not just those motivated to cast a particular vote for illegal reasons." App. 17. This decision is fully consistent with this Court's precedent.

Even assuming that addressing vote buying and voter coercion are significant or compelling governmental interests, HB 366 is not sufficiently tailored to further these interests under any form of First Amendment scrutiny. Existing laws already serve these interests more directly by banning vote buying and voter coercion schemes without sacrificing protected political speech. App. 17-18; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2538 (2014) (striking down a 35-foot buffer zone around reproductive health care facilities, in part, because Massachusetts had ample alternatives that would more directly address its public safety interests without substantially burdening speech, including greater enforcement of "criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like"). And, as the Respondents' own cases illustrate, HB 366 needlessly sweeps within its scope protected political speech that has no conceivable connection to vote buying or voter coercion. App. 17-20-21; *see also, e.g.*, *United States v. Stevens*, 559 U.S. 460, 475 (2010) (federal criminal statute's ban on "depictions of animal cruelty" was overbroad because "[a] depiction of entirely lawful conduct runs afoul of the ban"); *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (Communications Decency Act of 1996 was overbroad because it "suppress[ed] a large amount of speech that adults have a constitutional right to send and receive"). In short, HB 366 is both unnecessary and overbroad. *See* App. 16-21.[4]

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[4] HB 366 is also not tailored to preserving ballot secrecy, as it bans *voluntary* disclosure of a photograph of a marked ballot as a form of political speech. Of course, nothing in HB 366 requires a person to *involuntarily* disclose a photograph of his or her marked ballot.

The First Circuit's decision is fully consistent with *Burson v. Freeman*, 504 U.S. 191 (1992). *Burson* upheld a 100-foot electioneering buffer zone around a polling place on Election Day. HB 366, by contrast, is not limited to speech at polling places or on Election Day. As the court of appeals succintly explained, "*Burson* is obviously distinguishable" from this case:

> 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 physicial election spaces from interference and coercion**. 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.
>
> 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**.

App. 16 (internal citations ommitted) (emphasis added).

Put another way, the statute in *Burson* protected voters in and around the polling place from electioneering activities directed at voters by third parties on Election Day only. In contrast, HB 366 imposes a restriction on a voter's ability to engage in online political speech that is wholly untethered to the

polling place or Election Day itself. HB 366, for example, makes it a crime for a person to post online his or her marked ballot months or even years after Election Day, and far from the polling place.

The district court also correctly recognized that *Burson* "is a very different case," and that New Hampshire cannot simply "look to history" as a justification for HB 366's newly-imposed speech restrictions. App. 50. The prohibition in *Burson* against electioneering in and near a polling place has long been part of the historical record in American elections, thereby supporting the court's conclusion that such electioneering-free zones were necessary to preserve the sancity of the polling place. *See Burson*, 504 U.S. at 207-08. HB 366's ban on online political speech, by contrast, "is quite new and cannot be tied to historical evidence of recent vote fraud." App. 50-51. New Hampshire further concedes that, unlike the restriction in *Burson* that was the product of actual historical problems, HB 366 does not respond to a present "actual problem" in need of solving. App. 13. Simply put, there is no record—historical or otherwise—supporting New Hampshire's unfounded concern that online ballot selfies will lead to vote buying or voter coercion.

Finally, as noted above, because New Hampshire's law has no extensive historical background and is one of only two state laws recently enacted to target Internet speech (the other being Indiana), this case would be a poor vehicle to address the constitutionality of ballot selfie bans more broadly in the United States. Most state bans, unlike HB 366, are decades-old

general prohibitions that were not drafted with online speech in mind.

In sum, the court of appeals' decision in this case conflicts with no other decision of a court of appeals, a state supreme court, or this Court. Moreover, it concerns a state law specifically targeted at Internet speech that is unlike the vast majority of state laws that arguably prohibit ballot selfies. There is no basis for certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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