



January 30, 2017

The Honorable Jonathan Kreiss-Tomkins, Chair
The Honorable Gabrielle LeDoux, Vice-Chair
House State Affairs Committee
Alaska House of Representatives
State Capitol
Juneau, AK 99801

by email: Representative.Jonathan.Kreiss-Tomkins@akleg.gov
Representative.Gabrielle.LeDoux@akleg.gov

Re: Constitutional Support for HB 7: An Act relating to the exhibition of marked ballots

Dear Chair Kreiss-Tomkins and Vice Chair LeDoux:

The American Civil Liberties Union of Alaska Foundation supports HB 7 because it codifies the fundamental constitutional protections for core political speech and creates important clarification for the Division of Elections about the constitutional limitations in the enforcement of Alaska's ballot laws. Publishing a ballot photograph or a ballot selfie, which generally occurs through social media, is an important and effective means of political expression that is protected by the First Amendment.¹ As one federal judge noted, "Celebrities, politicians and government leaders, even Pope Francis and the Dali Lama, have had selfies taken, posted, and viewed thousands or millions of times."²

Thank you for the opportunity to provide testimony about House Bill 7. The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska, and our mission is to preserve and expand the individual freedoms and civil liberties guaranteed by the Alaska and United States Constitutions. We urge the committee to pass HB 7.

1. Constitutional Issues in Restricting Ballot Photographs

Leon Rideout, a Republican politician from the New Hampshire House of Representatives, was on the ballot for the primary election in September 2014.³ He went to his local polling

¹ See *id.*; *Indiana Civil Liberties Union Foundation, Inc. v. Indiana Sec'y of State*, 1:15-cv-01356, 2017 WL 264538, at *3-4 (S.D. Ind. Jan. 19, 2017).

² *Silberberg v. Bd. Of Elections of N.Y.*, --- F.3d ---, 2016 WL 6537691 (S.D.N.Y., Nov. 3, 2016).

³ *Rideout v. Gardner*, 123 F. Supp. 3d 218, 226 (D.N.H. 2015), *aff'd*, 838 F.3d 65 (1st Cir. 2016).

place in Lancaster, and after marking his ballot, took a photograph of himself holding the ballot, which indicated that he had voted for himself.⁴ A few hours after casting his ballot, he posted the photograph to Twitter, with the caption “#COOS7 vote in primary 2014 #nhpolitics.”⁵ Around the same time, another individual—Andrew Langlois—who was unhappy with the choices he was given for the Republican primary for the U.S. Senate seat, posted a photograph of himself with his marked ballot on Facebook, writing “Because all of the candidates suck, I did a write-in of [my recently deceased dog].”⁶

After the New Hampshire Attorney General’s Office brought criminal proceedings against them under a similar New Hampshire law prohibiting ballot photographs, Langlois and Rideout’s challenges to the constitutionality of the New Hampshire law resulted in a decision by the U.S. Circuit Court of Appeals for the First Circuit holding that a restriction on ballot selfies violated the constitutional guarantees of core political speech—*Rideout v. Gardner*.⁷

In the context of the First Amendment’s Free Speech Clause, restrictions on the *content* of speech are presumptively invalid, and subject to the most rigorous, exacting scrutiny that the U.S. Supreme Court employs in determining whether a law is constitutional.⁸ In other words, *what* one says, as opposed to when, where, or how one says something, is most vigorously protected.⁹ Court review of such content restrictions is aptly known as “strict scrutiny.”¹⁰ The trial court in the *Rideout* case had determined that the restriction on ballot selfies was a content-based restriction because it “deprives voters of one of their most powerful means of letting the world know how they voted.”¹¹ On appeal, the court of appeals did not address this question, but instead concluded that a restriction on ballot selfies even failed the less stringent—intermediate-scrutiny—test because the state had failed to prove a relationship between the ban on ballot selfies, and the government’s professed interest: reducing vote-buying.¹² As the court explained, vote-buying, the

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ 838 F.3d 65 (1st Cir. 2016).

⁸ See, e.g., *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665-66 (2004).

⁹ Time, place, or manner restrictions on speech are subject only to so-called “intermediate scrutiny,”

¹⁰ *Id.*; see also *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 205 (Alaska 2007) (“It is exceedingly rare that any law restricting speech based on its content . . . will be upheld . . . [s]uch restrictions are subject to the strictest scrutiny, and ‘only a regulation which impinges on the right . . . to the least possible degree . . . will pass constitutional muster.’” (quoting *Vogler v. Miller*, 651 P.2d 1, 5 (Alaska 1982))

¹¹ *Rideout v. Gardner*, 123 F. Supp. 3d 218, 230 (D. NH Aug. 11, 2015). The U.S. District Court for the Southern District of Indiana, has also held that a ban on ballot selfies is a content-based restriction. *Indiana Civil Liberties Union Foundation*, 2017 WL 264538, at *3-4.

¹² *Rideout*, 838 F.3d at 72.

justification for prohibiting ballot selfies, “does not respond to a present actual problem in need of solving.”¹³

Other states have historically enacted statutes like the one AS 15.15.280 in order to counteract vote-buying. “The ‘compelling’ nature of the government’s interest in enacting sweeping laws to guard against vote buying is subject to considerable doubt,[] given that vote buying is so rare as to be statistically non-existent even in jurisdictions where it is theoretically easy to accomplish.”¹⁴ Restricting ballot photographs in order to counteract vote-buying fails to satisfy the First Amendment for three reasons:¹⁵

- (1) “The ‘compelling’ nature of the government’s interest in enacting sweeping laws to guard against vote buying is subject to considerable doubt,[] given that vote buying is so rare as to be statistically non-existent even in jurisdictions where it is theoretically easy to accomplish”;¹⁶
- (2) Photographs of a ballot are not evidence of vote-buying because a voter could simply change his or her vote after photographing it;¹⁷ and
- (3) It is too broad: prohibitions on ballot photographs unnecessarily includes a substantial amount of protected political speech that is not related to unlawful vote-buying.¹⁸

2. HB 7: Exceptions for Marked Ballot Images

Current law provides that no voter shall exhibit a ballot to “an election official or any other person so as to enable the person to ascertain how the voter marked the ballot.”¹⁹ Violations of this law prohibit election officials from submitting the marked ballot to the ballot box, and instead requires them to mark an exhibited ballot as “spoiled” and to destroy it.²⁰

¹³ *Id.*

¹⁴ Daniel A. Horwitz, A Picture’s Worth A Thousand Words: Why Ballot Selfies Are Protected by the First Amendment, 18 SMU Sci. & Tech. L. Rev. 247, 250 (2015) (citations omitted).

¹⁵ Prohibiting photographs of a ballot is an unconstitutional response to vote-buying whether it the court views the restriction as a content-based one (strict scrutiny), or as a general restriction on the time, place, and manner of speech (intermediate scrutiny). *Id.*

¹⁶ Daniel A. Horwitz, A Picture’s Worth A Thousand Words: Why Ballot Selfies Are Protected by the First Amendment, 18 SMU Sci. & Tech. L. Rev. 247, 250 (2015) (citations omitted).

¹⁷ Voters may indicate that a ballot is spoiled with “improper[] marks” and request up to three ballots, with the spoiled ballots destroyed by the election board. AS 15.15.250; *see also* AS 15.20.061 (allowing voters to request up to three ballots for spoiled *absentee* ballots).

¹⁸ *Rideout*, 838 F.3d at 73; *Indiana Civil Liberties Union*, 2017 WL 264538, at *7.

¹⁹ AS 15.15.280.

²⁰ AS 15.15.300.

HB 7 would appropriately include a new exception to voters who “share[] a photo, video, or other image of the voter’s marked ballot with another person or with the public.” Although the Division of Elections had indicated that it would not enforce AS 15.15.280 in the most recent November 8 election,²¹ HB7 clears up conflicting constitutional and statutory directives to the Division of Elections. HB 7 makes clear to the Division that that photographs of premarked ballots are constitutionally protected and ought not to be grounds to spoil and destroy a voter’s submitted ballot.²²

Although HB 7 would exempt the protected core political speech by allowing photographs, video, or other images of a marked ballot to be shared with another person or the public, the voter is nonetheless prohibited from campaigning within two hundred feet of the polling place.²³ If the Committee seeks to clarify this prohibition, it should make clear that showing the marked ballot, if intended to persuade another on how to vote, is nonetheless prohibited. However, merely “sharing” one’s marked ballot on social media is constitutionally protected.

Conclusion

We appreciate the opportunity to share our concerns about HB 7 with the House State Affairs Committee. We hope our testimony proves valuable to Members contemplating HB 7.

Sincerely,



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Legal & Policy Director

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²¹ Erica Martinson, “Can I post a selfie from the ballot booth? Bring a gun? And other questions about voting in Alaska.” *Alaska Dispatch*, Nov. 6, 2016, available at <https://www.adn.com/politics/2016/11/06/can-i-post-a-selfie-from-the-ballot-booth-in-alaska-and-other-questions-about-voting-in-the-last-frontier>.

²² See AS 15.15.300.

²³ AS 15.15.170; see also *Burson v. Freeman*, 504 U.S. 191, 210-211 (1992).