No. 15-2021

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LEON H. RIDEOUT; ANDREW LANGOIS; 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

On Appeal from a Judgment of the United States District Court
for the District of New Hampshire

BRIEF OF NEW ENGLAND FIRST AMENDMENT COALITION AND THE KEENE SENTINEL AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES, SUPPORTING AFFIRMANCE

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FED R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

The New England First Amendment Coalition ("NEFAC") is a 501(c)(3) nonprofit organization. NEFAC does not have a parent company, and no publicly held corporation owns 10% or more of its stock.

The Keene Sentinel is owned by the Keene Publishing Corporation, a New Hampshire corporation. No publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

As set forth further in the accompanying motion for leave to file this brief, the New England First Amendment Coalition ("NEFAC") and the Keene Sentinel (collectively, "*Amici*") are organizations dedicated to the promotion of freedom of expression and the First Amendment.[1] NEFAC is a 501(c)(3) nonprofit organization of lawyers, journalists, historians, librarians, and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment and the principle of the public's right to know in New England, and regularly files *amicus curiae* briefs on press freedom issues.

The Keene Sentinel is one of the oldest continuously published newspapers in the United States and has long protected the First Amendment to the United States Constitution as part of its mission. The Keene Sentinel is also an organization dedicated to the public's right to know and has frequently advocated for these rights in its news and opinion pages and in the courts.

[1] Pursuant to Fed. R. App. P. 29(c)(5), *Amici* hereby state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than *Amici*, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

New Hampshire amended its ballot disclosure laws specifically to prevent a person from taking a photograph of a marked ballot and sharing it on social media because, in the words of one representative, the legislature was worried that "showing your ballot on social media could cause undue influence." *Rideout v. Gardner*, 123 F. Supp. 3d 218, 222 (D.N.H. 2015). What the legislator called "undue influence," the Supreme Court has called "the essence of First Amendment expression." *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 347 (1995) (striking a law that sought to prevent anonymous speech "designed . . . to influence the voters in any election"). The entire premise of this legislation was therefore constitutionally void *ab initio*. As set forth further below, a growing percentage of citizens use precisely this form of expression as a way to spur others to vote, and to support a particular candidate. This is not a problem that should be avoided. It is a modern expression of the longstanding hallmark of our democracy, that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Amici are media and media-support organizations dedicated to the principles of the First Amendment and ensuring that the public is meaningfully informed

about elections and the political process. *Amici* agree with the District Court and the Appellees that the law clearly is a content-based restriction of speech, deserves to be treated as such given the dangers to speech inherent in this law, and cannot possibly satisfy strict scrutiny. *Amici* write specifically to emphasize the dangers inherent in this law, and the serious harms that laws like the one here present to legitimate newsgathering, civic participation, and public debate.

ARGUMENT

I. THE NEW HAMPSHIRE STATUTE IS A CONTENT-BASED RESTRICTION OF SPEECH AND PRESENTS THE SPECIFIC DANGERS THAT FIRST AMENDMENT DOCTRINE SEEKS TO AVOID.

As amended in 2014, N.H. Rev. Stat. Ann. § 659:35 prohibits "taking a digital image or photograph of [one's] marked ballot and distributing or sharing the image via social media." The law singles out a particular category of speech for punishment, and it identifies that category by the content of the speech. On its face, this is a content-based restriction of speech and is therefore subject to strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Allowing this law to remain on the books presents the specific dangers that courts have sought to avoid though the content discrimination doctrine. The statute therefore violates the First Amendment and must be struck down.

A. The New Hampshire Statute Is Plainly Content Based and Targets Core Political Speech.

The statute at issue is a content-based restriction of speech. Last year, the Supreme Court made clear that a statute may be content-based either if it makes distinctions based on content on its face, or if it is motivated by content-based concerns. *Id.* at 2227. The second prong derives from *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989), and is the prong on which this Court has historically focused. *See, e.g.*, *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 74–75 (1st Cir. 2014); *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 183 (1st Cir. 1996); *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 737 (1st Cir. 1995). The Supreme Court in *Reed*, however, clarified that focusing exclusively on the second prong "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Reed,* 135 S. Ct. at 2228; *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642–43 (1994) ("[T]he mere assertion of a content-neutral purpose" does not "save a law which, on its face, discriminates based on content.").

The motivations of New Hampshire in enacting the law therefore are irrelevant here; the law plainly proscribes the photography and dissemination of a particular type of speech, to wit, completed ballots used for "the choosing of a public officer or of a delegate to a party convention or the nominating of a candidate

for public office." N.H. Rev. Stat. Ann. § 652:1. Determining the legality of a particular photograph necessarily requires enforcement authorities to "examine the content of the message that is conveyed," *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984), to see if it is a ballot, and if so, if it is an official ballot for election as described above, and if so, if the ballot is "marked." "Such official scrutiny of the content of publications . . . is entirely incompatible" with the guarantees of the First Amendment. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

This danger is all the more significant because the statute inherently targets political speech. Political speech is a "core" concern of the First Amendment, and protection of speech is never stronger than when the speaker is addressing political or governmental issues. *See McIntyre*, 514 U.S at 347. Moreover, the particular type of political speech at issue is becoming an increasingly prevalent mode of expression among voters. While estimates of the number of people who display photographs of their ballot as a way to document their voting experiences or express their political preferences are unavailable, the practice is widespread and growing in popularity. In the 2012 presidential election, 22 percent of registered voters "announced on a social networking site . . . how they voted or planned to vote." Lee Rainie, *Social Media and Voting*, Pew Research Center (Nov. 6, 2012),

http://www.pewinternet.org/2012/11/06/social-media-and-voting/. The number of citizens who do so by posting pictures of their ballots has grown so much that 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/. The popularity of "ballot selfies" is explained in part by the prevalence of cell phones that contain cameras capable of publishing photos on social media. *See* Monica Anderson, *Technology Device Ownership: 2015*, Pew Research Center (Oct. 29, 2015), http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/. The combination of an increasingly accessible technology and a society that conducts more and more of its political and civic speech online results in a large and growing number of people who post photographs of their completed ballots on social media. This activity persists in spite of efforts in New Hampshire and other states to limit the practice.[2]

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[2] While many states have "ballot disclosure" laws, New Hampshire's is unique in that it specifically seeks to prohibit disseminating a photograph of a marked ballot, instead of merely prohibiting the display of a marked ballot as a general matter. *See State Law: Document the Vote 2012*, Digital Media Law Project, http://www.dmlp.org/state-law-documenting-vote-2012 (last updated Nov. 9, 2012) (surveying ballot photography laws in all 50 states). As applied to activities like those of the Appellees, the First Amendment should block the use of such general statutes across the country. But as against a facial challenge, the more general laws may be susceptible to a saving construction, confining them solely to

The general societal benefits this new form of political expression are discussed in Section II below, but it is worth noting as well that this activity appears to be especially prevalent among younger voters. *See* Rainie, *supra*. Any activity that increases civic engagement among younger voters should be recognized as a universal social good. *See* Daniel A. Horwitz, *A Picture's Worth a Thousand Words: Why Ballot Selfies Are Protected by the First Amendment*, 18 SMU Sci. & Tech. Law Rev. 247, 254 (2015) ("[P]roudly sharing one's voting experience and political preferences on social media represents a positive sign of civic engagement that should be welcomed and perhaps even encouraged in a political climate in which many voters — especially young voters — never vote at all." (internal quotations omitted)).

Of course, many others may opt not to use this method to share how they voted for personal, professional, or normative reasons, but the First Amendment mandates that the editorial decision about whether and how to speak rests with the speaker, not the state. *See Washington Legal Found. v. Mass. Bar Found.*,

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disclosure done while still in the polling place, or disclosure done to further a vote buying scheme. *See Cutting v. City of Portland*, 802 F.3d 79, 84–85 (1st Cir. 2015); Jeffrey Hermes, *Ballot Disclosure Laws: A First Amendment Anomaly*, Digital Media Law Project (Nov. 2, 2012), http://www.dmlp.org/blog/2012/ballot-disclosure-laws-first-amendment-anomaly. Here, however, no logical reading of New Hampshire's law is susceptible to such a saving construction.

993 F.2d 962, 976–77 (1st Cir. 1993) (the First Amendment protects both the right to speak and the right not to speak). And while viewers of ballot selfies may vehemently disagree with the speaker's preferences on candidates or issues, or be influenced to agree with the speaker, an invitation to engage in that sort of dialogue is the chief virtue of our system of freedom of expression, and not the vice that the New Hampshire government makes it out to be. *See* Alexander Meiklejohn, *Political Freedom* 28 (1960) ("If [conflicting views] are responsibility entertained by anyone, we, the voters, need to hear them. When a question of policy is 'before the house,' free men choose to meet it not with their eyes shut, but with their eyes open."). Ballot selfies are a popular, modern form of core political expression, and any attempt to limit their use or regulate their content should meet exacting scrutiny. *Buckley*, 424 U.S. at 44–45.

B. Application of this Statute Presents the Specific Dangers that Courts Have Sought to Address Through the First Amendment's Content Discrimination Doctrine.

The widespread popularity of this activity mandates that this law be struck. As the Supreme Court recently said about another content-based statute that the government promised to only use when appropriate, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010); *see also Reed*, 135 S. Ct. at

2229 ("Innocent 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."). Certainly the State of New Hampshire has demonstrated no such noble generosity toward the Appellees here, who were threatened with sanctions for vote buying after the Appellees used ballot photographs to share votes for themselves or their dog. *Rideout*, 123 F. Supp. 3d at 226–27. One assumes a person needs no bribe to vote for themselves. But more fundamentally, First Amendment doctrine opts for a more categorical approach in guarding against content-based laws, because an alternative test, such as a balancing test, would "inevitably become intertwined with the ideological predispositions of those doing the balancing — or if not that, at least with the relative confidence or paranoia of the age in which they are doing it." John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1501 (1975).

Such concerns are borne out here. Given how many people are engaging in speech purportedly prohibited by the statute, there is a strong risk of selective enforcement based on ideological perspectives. While the sample size is small and no clear discriminatory motivation is discussed in the District Court's opinion, it is noteworthy that all three Appellees are Republicans, and were threatened with

sanction by the office of the New Hampshire Attorney General, Joseph A. Foster, a Democrat. *Rideout*, 123 F. Supp. 3d at 226–27; *see see Joseph A. Foster*, Nat'l Assn. of Attorneys General, http://www.naag.org/naag/attorneys-general/whos-my-ag/new_hampshire/joseph-foster.php (last visited April 22, 2016). The ability of the State to selectively deter certain expressions of political views, and thus selectively change which political expressions members of the public see online, should be a cause for concern. *See Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("A long line of cases in this Court makes it clear that a State . . . cannot require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say that some ideas may, while other ideas may not, be disseminated." (internal quotation omitted)). Even if New Hampshire does not, in fact, engage in such selective enforcement, the possibility of such activity can deter politically marginalized groups. As Justice Thurgood Marshall put it in a case concerning speech of government employees, "the value of a sword of Damocles is that it hangs — not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

The "relative . . . paranoia of the age" in which the state is acting here is also on display. Ely, *supra*, at 1501. The State of New Hampshire is suppressing speech out of what seems to be an obsessive concern over vote buying. To be sure, New

Hampshire is right to strictly prohibit buying votes, and it already does so elsewhere. *See* N.H. Rev. Stat. Ann. § 659:40. But as the District Court concluded after an extensive review, there is simply no evidence whatsoever that vote buying is actually happening, much less that it is happening with the use of "ballot selfies." *Rideout*, 123 F. Supp. 3d at 232–33. Vote buying and voter fraud are often raised as causes for concern — and discriminatory laws have been passed in many states under this justification — but in truth there is little evidence that the practice is actually happening to any significant degree, or that restrictions such as these are necessary to prevent their occurrence. *See generally Last Week Tonight with John Oliver: Voting* (HBO television broadcast Feb. 14, 2016), http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/3/60-february-14-2016/video/ep-60-clip-voting.html (extensively analyzing how concerns over individualized vote-buying are routinely over-exaggerated). This fight against paper tigers corrodes free expression, as it leads law enforcement, legislators, and the public to act irrationally, with deleterious long-term effects for freedom of expression and self-governance. *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 457–58 (1985). Courts guard against this irrationality with the requirement that states demonstrate that restrictions on speech address an "actual problem" and are "actually necessary to the solution." *Brown v. Entm't Merchants*

Ass'n, 131 S. Ct. 2729, 2738 (2011). New Hampshire failed to do so here, and the law must therefore be struck.

II. Restricting Images of Ballots Suppresses Speech that Is Critical to Informing the Public About Politics and Elections.

The State of New Hampshire claims that courts should not be concerned about a ban on photography of one's own ballot because the restriction leaves open ample other ways to declare one's voting preferences. Appellant Br. 26–27. First of all, this is irrelevant when considering a content-based law such as the statute here; courts consider the availability of alternative channels of communication only when assessing the constitutionality of content-neutral laws. *See AIDS Action Comm. of Mass. v. MBTA*, 42 F.3d 1, 6 (1st Cir. 1994). But more importantly, the statement is incorrect. Photographs can show things that words cannot, and photography of ballots can allow the public to understand things that cannot be expressed through other channels.

A. Photography Is Protected by the First Amendment and Can Communicate Ideas that Words Alone Cannot.

Photography and videography is plainly an expressive activity that qualifies for First Amendment protection. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) ("It is firmly established that the First Amendment's aegis . . . encompasses a range of conduct related to the gathering and dissemination of information."); *see also*

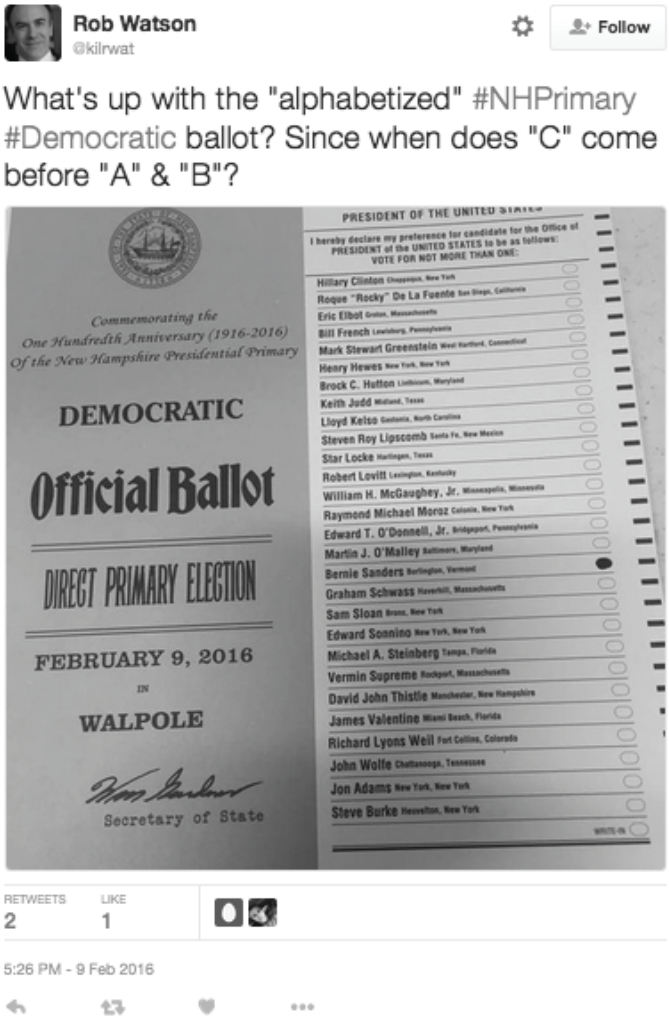
Massachusetts v. Oakes, 491 U.S. 576, 591 (1989). Courts have long recognized the power of images to "add a material dimension to one's impression of particular news events." *Cable News Network, Inc. v. ABC, Inc.* 518 F. Supp. 1238, 1245 (N.D. Ga. 1981); *cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (observing that the use of symbols to express ideas "is a short cut from mind to mind"); *United States v. Frabizio*, 459 F.3d 80, 86 (1st Cir. 2006) (noting, when describing a photographic exhibit from a trial, that "a thousand words are not necessarily worth a picture"); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) ("The ideas and concepts embodied in visual art have the power to transcend . . . language limitations.").

Photography can tell stories, communicate ideas, and spread messages that cannot be expressed using only words, no matter how carefully written or eloquently expressed. The value of images comes from their ability to communicate a message instantly, to make it personal to an audience, and to spur an audience to action. To take but one example, the footage of the attack on civil rights demonstrators in Selma, Alabama, "'touched a nerve deeper than anything that had come before.' . . . [T]he national broadcast of this footage was a turning point in the civil rights movement." *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 96–97 (D. Mass. 2002) (quoting John Lewis & Michael D'Orso,

Walking With the Wind: A Memoir of the Movement 344 (1998)). Politicians know the connection between images and engagement: research shows that audiences engage with political messages on social media more when the messages contain images. *See The Twitter Government and Elections Handbook*, Twitter 49 (2014), https://g.twimg.com/elections/files/2014/09/16/TwitterGovElectionsHandbook.pdf (noting that messages by government officials and political candidates are reposted by other users 62 percent more frequently if they contain images).

B. Images of Ballots Are Routinely Used to Monitor the Government, Engage in Political Discussions, and Promote Civic Engagement.

Photos of ballots, in particular, can communicate certain speech more effectively than words can. To begin, photography can help citizens report on potential issues with their electoral process. For example, a New Hampshire voter this February was surprised to find the candidates on his ballot were arranged in alphabetical order beginning with the letter "C" instead of "A," putting former Secretary of State Hillary Clinton's name at the top when it would not have been otherwise. The voter expressed this concern with the following image, posted to the social media website Twitter:

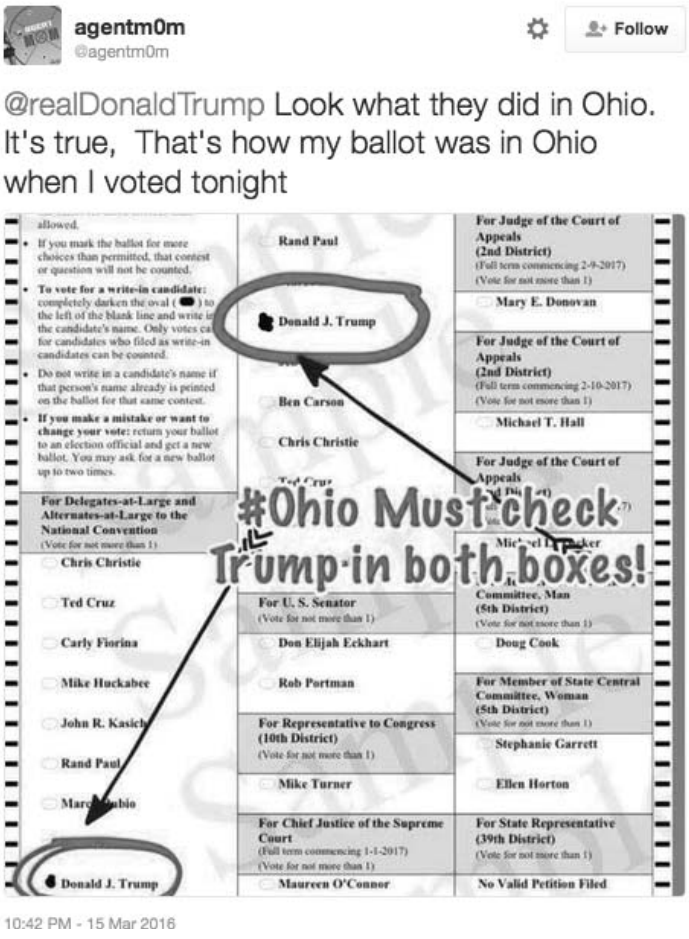


Rob Watson (@kilrwat), Twitter (Feb. 9, 2016, 5:26 PM), https://twitter.com/kilrwat/status/697184722720595968. Another user from another town saw this, compared it to his own ballot, and noted that his began with the letter "O," suggesting that the order was randomized, and that no actual mischief was at play. *See* George Kylo Costanza (@NHKeith), Twitter (Feb. 9, 2016, 5:57 PM), https://twitter.com/NHKeith/status/697192678191005696. This on-the-fly comparison and correction of misinformation is a direct result of the first

voter's ability to post a photo of his ballot. Indeed, popular skepticism of news spread on the Internet means that many readers now *require* photographic proof of alleged activity before they will take it seriously. *See* Yochai Benkler, *The Wealth of Networks* 228 (2006) ("[T]he ubiquity of storage and communications capacity means the public discourse can rely on 'see for yourself' rather than on 'trust me.' The first move, then, is to make the raw materials available for all to see.").

Photos of completed ballots, rather than simply blank ballots, also serve to educate the public in a broader sense, making clear how to properly cast a vote. In Ohio's March 2016 Republican primary, a last-minute change in the way the state apportioned delegates resulted in a ballot that included two separate boxes for voting for a presidential nominee, each of which contained the names of all of the candidates, but only one of which counted. Press Release, Ohio Secretary of State Jon Husted (March 8, 2016), http://www.sos.state.oh.us/sos/mediaCenter/2016/2016-03-08-a.aspx. Even more confusingly, the box that appeared at the top, center of the ballot was the box that did not count; voters had to know to look down the page and to the left to find the part that counted. Julie Carr Smyth, *On Ohio's GOP Primary Ballot: Confusion*, Associated Press (March 4, 2016), http://www.cincinnati.com/story/news/politics/elections/2016/03/04/ohios-gop-primary-ballot-confusion/81323608/. It was a problem that took multiple sentences

to describe and even then could leave voters confused, but became much simpler to understand when a Donald Trump supporter posted photos on Twitter demonstrating the correct way to complete the ballots and, to be safe, encouraging other voters to fill out both boxes anyway:

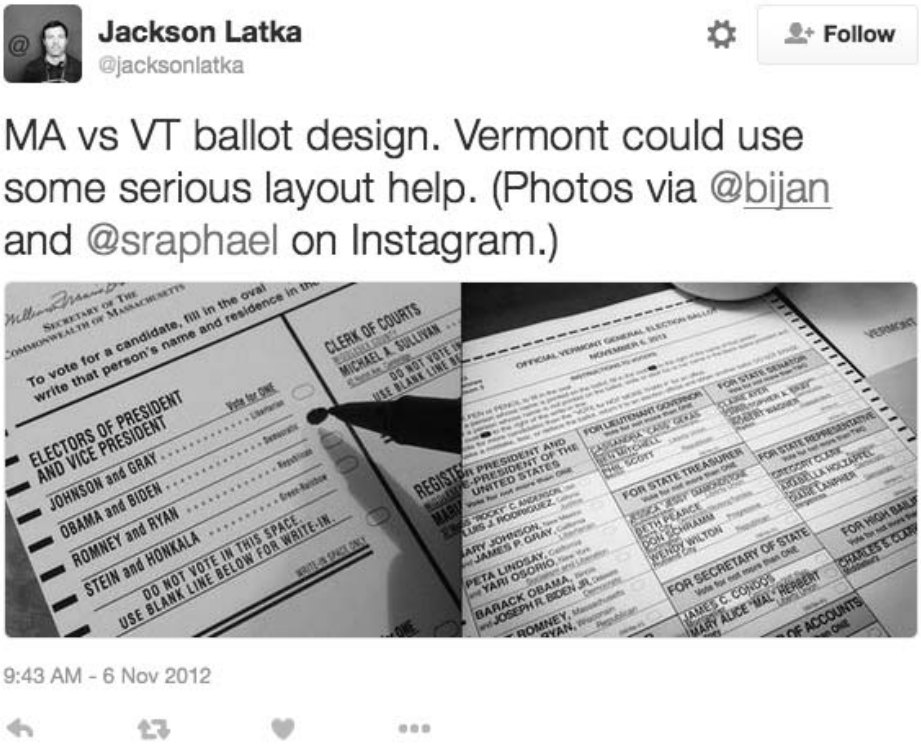


@agentm0m, Twitter (March 15, 2016, 10:42 PM), https://twitter.com/agentm0m/status/709932780742942720. The message demonstrated that photographic speech can clear voter confusion, communicating ideas simply and effectively.

If left uncorrected, this kind of confusion can have drastic consequences. In the 2000 presidential election in Florida, voter confusion over the state's punch-card ballot system contributed to state officials' difficulty in counting the votes and culminated in a divisive decision by the Supreme Court. *See Bush v. Gore*, 531 U.S. 98, 118–19 (2000) (Rehnquist, J., concurring). Thousands of people submitted ballots in which the paper hole denoting the voter's chosen candidate was not fully punched, leaving an infamous "chad" behind. Ford Fessenden, *Counting The Vote: The Ballots; After Cards Are Poked, The Confetti Can Count*, N.Y. Times (Nov. 12, 2000), http://www.nytimes.com/2000/11/12/us/counting-the-vote-the-ballots-after-cards-are-poked-the-confetti-can-count.html. If voters had had access to images depicting what an accurately filled-out ballot looked like, some of the mistakes made with these ballots could have been corrected.

Issues like the famous Florida incident have sparked a school of study in effective and clear ballot design, and here again images of ballots and marked ballots are critical. The Center for Civic Design produces manuals to aid governments in developing clear and effective ballots, and such guides use copious visual examples. *See Field Guides to Ensuring Voter Intent*, Ctr. for Civic Design, http://civicdesign.org/fieldguides/ (last visited April 14, 2016); *see also Butterfly Effects*, 99% Invisible (Nov. 1, 2015), http://99percentinvisible.org/episode/

butterfly-effects/ (discussing the role of visual design theory in ballots); Lawrence Norden et al., *Better Design, Better Elections*, Brennan Ctr. for Justice (2012), http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Better_Design_Better_Elections.pdf. Voters can and do use photos of their ballots to highlight design problems and call attention to other governments that do a better job of making their ballots clear and understandable:



Jackson Latka (@jacksonlatka), Twitter (Nov. 6, 2012, 9:43 AM), https://twitter.com/jacksonlatka/status/265826682005508096. With the breadth with which New Hampshire prevents the publication of photographs of marked

ballots, the state risks silencing valuable scrutiny of its own ballot design and accessibility.

The ability of all citizens, rather than only professional journalists, to take photos that capture newsworthy events and engage in public discussion about ballots and elections is increasingly important today as traditional media faces tighter resource constraints and citizens increasingly turn to social media as a source of information and discussion. *See* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. Cal. L. Rev. 1, 3 (2011) ("The old model [of journalism] was 'one-to-many,' a top-down system of media professionals producing and delivering news to a mass audience. The new model is 'many-to-many,' in which anyone with a computer and Internet access can produce and disseminate news."). As this Court has noted previously, "[t]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Glik*, 655 F.3d at 84. The Supreme Court has long recognized the importance of a free press in providing information to the public and acting as a "powerful antidote to any abuses of power by governmental officials." *Mills v. Alabama*, 384 U.S. 214, 219

(1966). Today, that function — especially at the local level — is greatly aided by the ability of all citizens to freely document their daily lives. Steven Waldman, *The Information Needs of Communities*, FCC at 5 (2011), http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

And beyond a watchdog function, the common use of photos of ballots to promote civic engagement is worthy of protection in its own right. In one poignant example, a New Hampshire man posted a photo of himself and his son, each holding marked ballots, and with the father noting that it was his son's first time voting:

Tom Masiero (@BlendahTom), Twitter (Feb. 9, 2016, 11:45 AM), https://twitter.com/BlendahTom/status/697098903594864640. His joy — and thus his message — was communicated in the photo in a way that could not be expressed through the text.

Without displaying photos of their completed ballots, the voters highlighted above and others like them could not have effectively communicated their ideas. A law that would inhibit citizens from voicing their criticisms of government or commenting on the political issues of the day cannot stand under the First Amendment. New Hampshire's statute should be struck.

CONCLUSION

For the foregoing reasons, *Amici* ask that this Court hold in favor of the Appellees and affirm the District Court's grant of summary judgment.

Respectfully submitted,

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[3] *Amici* wish to thank Harvard Law School Cyberlaw Clinic students Michael Linhorst and Jacqueline Wolpoe for their invaluable contributions to this brief.

CERTIFICATE OF COMPLIANCE

I, Christopher T. Bavitz, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,697 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac version 15.20, in Equity typeface, 14-point size.

Dated: April 22, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I electronically filed the above motion for leave to file a brief as *amici curiae* with United States Court of Appeals for the First Circuit using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF filers and they will be served through the CM/ECF system:

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Dated: April 22, 2016

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