No. 15-2021

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LEON H. RIDEOUT; ANDREW LANGOIS; BRANDON D. ROSS

Plaintiff - Appellees

v.

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

Defendant – Appellant

BRIEF OF THE APPELLANT, WILLIAM M. GARDNER, in his official capacity as Secretary of State of New Hampshire

William M. Gardner,
By his attorney,

JOSEPH A. FOSTER
NEW HAMPSHIRE ATTORNEY
GENERAL

March 7, 2016

Stephen G. LaBonte
1st Cir. Bar No. 1171810
Laura E. B. Lombardi
Senior Assistant Attorney General
1st Cir. Bar No. 104633
NH Department of Justice
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3650

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I. JURISDICTIONAL STATEMENT

The U.S. District Court, District of New Hampshire (District Court) had jurisdiction under 28 U.S.C. § 1331because the action arose under the First and Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. On August 11, 2015 the District Court entered judgment in favor of the Plaintiffs with the Memorandum and Order on the cross motions for summary judgment. JA[1] 1. On September 4, 2015 William M. Gardner, New Hampshire Secretary of State, acting in his official capacity filed a timely notice of appeal. JA 2-3. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from the final order of the District Court.

[1] JA refers to Joint Appendix.

II. STATEMENT OF THE ISSUES

1. Did the Trial Court err by finding that RSA 659:35, I, was a content based restriction on speech that cannot survive strict scrutiny?

III. STATEMENT OF CASE

At the heart of this case lies the authority of the New Hampshire Legislature ("the 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 leaps and bounds of technology over the past century. House Bill 366 (HB 366) is the Legislature's latest effort to ensure that the voters of New Hampshire may cast their vote free from the threat of reprisal, ensuring that elections in New Hampshire are not purchased or coerced. The purpose of HB 366 was to update RSA 659:35, I, a statute which was first enacted in the 1890s, in an effort 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." RSA 659:35, I (2013). The Statute as it previously existed was only effective during the short period of time when the voter left the voting booth and when the voter inserted the ballot in the ballot box or electronic counting device.

As amended during the 2013/14 legislative session, effective September 1, 2014, the statute 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.***

RSA 659:35, I (2014) (emphasis added to highlight amendment). The statute as amended is a reasonable content neutral restriction furthering the important governmental interest of ensuring the purity and integrity of our elections.

In substance what the amendment does is prevent a voter from using his or her ballot as evidence of how he or she has 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 they voted by any other means other than by use of an official ballot.

A. Statement of Facts

In the mid to late 1800s schemes involving voter intimidation and coercion was an issue of concern. JA 123 (Scanlan Depo. 17:19-22). At the time the political parties and other interested groups would prepare their own ballots. *Id.* (at 18:8-9). Prior to being given to the voter the ballot would be

completed with a specific slate of candidates and the ballot would have unique characteristics so it could be identified. *Id*. (at 18:10-14) ("[P]olitical parties or unions or other groups could print their own ballots. They would be identifiable by size or the color. And it was – it was the ticket – it was the party ticket that the voter would go in and, you know, they would put it in the box. So anybody observing the process could quickly see how the person voted. ") (emphasis added). As an example the Democratic ticket could be blue and the Republican ticket could be red. *Id.* (at 18:15-18). Party leaders, union bosses and employers could observe a voter at the polling place and confirm how that voter voted based on the physical characteristics of the ballot the voter placed in the ballot box. *Id.* (at 18:18-20).

In 1891 legislation was passed which required the New Hampshire Secretary of State to prepare all ballots to be used at biennial elections and elections for state and national offices. JA 004, (1891 N.H. Laws Ch. 49, Sec. 10). This made it more difficult for political parties, unions and other interested groups to monitor how voters were actually voting. JA 123 (Scanlan at 19:7-11). Later in 1911 legislation was further passed making 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." JA 580-81, (1911 N.H. Laws Ch. 102, Sec. 2). A violation of the statute was punishable by a

fine of not more than $500 or imprisonment of not more than six months. *Id*. During that same legislative session a law was enacted making it a misdemeanor to offer, give or accept a bribe for the purpose of influencing the vote of any person at any election. JA 007-8,. (1911 N.H. Laws Ch. 99, Sec. 1).

The entire act of voting includes obtaining a ballot, marking the ballot and depositing the ballot in the ballot box or electronic counting device. JA 123 (Scanlan at 20:12-15). Prior to the enactment of the current amendment, RSA 659:35, I, regulated conduct up to the point the voter placed his ballot in the ballot box. *Id.* 124 (at 21:9-13). The drafters of the earlier version of the statute could not envision a need to regulate beyond the ballot box because the voter no longer had possession of the ballot and therefore he was relinquished of the direct evidence of how he voted. *Id.* 122 (at 16:7-14); 124 (at 21:17-22).

The need for HB 366 was to address a concern that with the aid of modern technology, such as digital photography and social media, a marked ballot is no longer under the exclusive control of the elections officials after the ballot has been cast and can still be used as evidence of how one voted. *Id.* 123 (at 17:4-8); 124 (23:3-10). This raised concerns with the Secretary of State's Office in that this technology could be used as a mechanism to

circumvent RSA 659:35 in furtherance of a vote buying scheme. JA 122 (Scanlan at 12:9 -13:9,); 124 (at 22:19-23, 23:1-10); 132 (at 54:12-23).

Secretary of State Gardner testified at his deposition that the legislation further protected a voter's right of conscience guaranteed by Pt. I, Art. 4 of the New Hampshire Constitution. JA 50 (Gardner Depo. 17:10 - 18:4); see also NH Const. Pt. I, Art. 4. Secretary Gardner explained that the legislation works to protect voters from those who may seek their vote through intimidation. *Id.* (at 18:7-10). As an example Secretary Gardner explained the circumstance behind the German annexation of Austria in 1938. *Id*. (at 18:7-10). After the German troops entered Austria, a plebiscite was held seeking the concurrence of the Austrian people. *Id.*(at 19:4-8). Adolf Hitler instituted election rules that allowed voters to voluntarily show their ballot as they were voting, and according to Secretary Gardner those who didn't paid the price. *Id.* at 19:8-11.

Secretary Gardner went on to explain that Saddam Hussein's method of conducting an election was to have the following question on the ballot, "do you wish to keep President Hussein – Saddam Hussein as president of the Democratic Republic of Iraq, Yes or No?" JA 50 (Gardner at 19:15-19). According to Secretary Gardner the ballot contained a code number which he believed could be traced back to the voter. *Id.* (at 19:19-21).

Although there appears to be no documented cases of vote buying within the state there are recent cases from around the country. One such case occurred in Kentucky involved Naomi Johnson and Earl Young, along with two co-defendants, Michael Salyers and Jackie Jennings. JA 15 (*United States v. Johnson*, 2012 U.S. Dist. LEXIS 76320, [*1] (E.D. Ky. Aug. 21, 2012) (attached decision along with subsequent appellate decisions). The four were indicted for conspiracy to buy votes and vote buying in violation of 18 U.S.C. § 371 and 42 U.S.C. § 1973i(c). *Id.* Michael Salyers was the leader of the conspiracy and the candidate for magistrate in Breathitt County for whom voters were paid to vote. *Id*. Slayers plead guilty to one count of conspiracy to buy votes. *Id*. (at *1-2). Jackie Jennings also plead guilty right before the start of trial. *Id*. (*2).

"The vote buying occurred in and around Salyers' Grocery store in Jackson, Kentucky." JA 16 (*United States v. Johnson*, at *2). Salyers owns the building in which the store was located, and Naomi Johnson operated the store. *Id*. Salyers testified that vote buying is common in Breathitt County and people came to the store offering to sell their votes because the word on the street was that he was buying votes. *Id*.

On some occasions voters came into the store offering to sell their

votes. *Id*. (at *3). On other occasions, conspirators solicited votes in exchange for money. *Id*. Salyers would arrange to have someone escort the voter(s) to the polling place. *Id*. The escort would then observe the voters vote. *Id*. Afterwards the escort brought the voter back to the store and confirmed to Salyers that the voter voted. *Id.*). Salyers would then pay the voter $20-25 for voting. *Id*.

Another case involving vote buying took place in Caldwell County, North Carolina. JA 27 (*United States v. Shatley*, 448 F.3d 264, 265, 266 (4th Cir. N.C. 2006)). During the campaign season prior to the November 2002 general election, Wayne Shatley and four others engaged in a widespread scheme to buy votes for the Republican candidate for sheriff, Gary Clark. *Id*. Shatley organized and financed the conspiracy, paying voters $25.00 each for their votes, using $ 5,000 to $ 6,000 of his own money. *Id*. Shatley was charged with a single count of conspiracy to buy votes, in violation of 18 U.S.C. § 371, and in three counts, with actually buying votes in violation of 42 U.S.C. § 1973i(c). *Id*. He was convicted on all counts. JA 027-28.

The next case involved four Democratic precinct committeemen in East St. Louis, Illinois. JA 33 (*United States v. Thomas*, 510 F.3d 714, 717 (7th Cir. Ill. 2007)). The four were convicted of election fraud crimes for

their participation in a vote-buying conspiracy during the November 2004 election. *Id*. The conspiracy involved Sheila Thomas, Jesse Lewis, Kelvin Ellis, and Charles Powell. *Id*. The evidence showed that in the course of chairing committee meetings, Powell directed committeemen to submit election-day budgets to the St. Clair County Democratic Committee for funds to pay voters in their precincts to vote for Democratic candidates during the 2004 General Election. *Id*. Thomas, Lewis and Ellis attended these meetings and participated in the vote-buying activities as directed. *Id*. Voters were paid $5.00 or $10.00 to vote for Democratic candidates. JA 036 (at 719). The four were convicted on all counts. JA 038 (at 721).

These cases are just three examples to demonstrate that vote buying schemes still pose a threat to the integrity of our election process. Although there is no evidence that digital photography played a role in any of the examples, it is certainly not hard to imagine such illegal activity would benefit from such technology. The use of digital photography and social media eliminates the need to have a physical person observe the voter to confirm the voters vote, thus reducing the possibility of the illegal activity being discovered.

B. Procedural History

On October 31, 2014 the the Appellees filed this action in U.S. District Court pursuant to 42 U.S.C. § 1983 challenging the constitutionality of RSA 659:35, as amended by HB336. The Appellees were seeking declaratory relief claiming that the statute violated the First and Fourteenth Amendments. On August 11, 2015 the District Court entered a Memorandum and Order declaring RSA 659:35, I as amended by HB366 unconstitutional because it is a content neutral restriction on speech that could survive strict scrutiny.

IV. SUMMARY OF THE ARGUMENT

A content-neutral statute is constitutional as applied to a particular plaintiff if it is narrowly tailored to serve a significant governmental interest. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). In the first instance RSA 659:35, I, as amended by HB 366 is facially content-neutral as its application does not hinge on the topic discussed or the idea or message conveyed. *See Reid v. Town of Gilbert,* 135 S. Ct. 2218, 2228 (2015). HB 366 is justified with out reference to the regulated speech in that its purpose and motive is to prevent vote buying and voter coercion and not to prevent discussion and debate of how one votes or should vote.

RSA 659:35, I, as amended by HB 366 is a reasonable restriction on

speech, narrowly tailored to prevent vote buying and voter coercion by prohibiting a voter from using his or her ballot as evidence of how he or she voted. A violation of the statute is not dependent on how the ballot is marked, thus not requiring a substantive examination of a marked ballot to determine if a violation has occurred. *McCullen v. Coakley,* 134 S. Ct. 2518, 2531 (2014).

RSA 659:35, I, when read in conjunction II of the statute further supports the Appellant's argument, as it prohibits the placement of any distinguishing marks on the ballot. The two paragraphs read together prohibit using a ballot in a manner to convey any message. Although there is little evidence of vote buying and voter coercion schemes currently being executed with the use of digital imagery, the Court should still consider the interest compelling because to rule otherwise prohibits a state legislature from acting proactively with regard to deficiencies in its electoral process. *Burson v. Freeman,* 504 U.S. 191, 218-19 (1992).

V. ARGUMENT

A. Standard of Review

Summary judgment is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must draw all reasonable

inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986), *Navarro v. Pfizer Corp*., 261 F.3d 90, 94 (1st Cir. 2001). Conclusory allegations, unsupported inferences and speculation are insufficient to defeat summary judgment. *Carroll v. Xerox Corp*., 294 F.3d 231, 236-37 (1st Cir. 2002). On cross motions for summary judgment, the standard of review is applied to each motion separately. *See Am. Home Assurance Co. v. AGM Maritime Contractors, Inc.*, 467 F.3d 810, 812 (1st Cir. 2006). This Court reviews a trial court's ruling on cross-motions for summary judgment d*e novo*. *Maritime & Northeast Pipeline LLC v. Echo Easement Corridor LLC*, 604 F.3d 44, 47 (1st Cir. 2010).

B. When Viewed In Its Entirety RSA 659:35 Is A Reasonable Content Neutral Regulation.

"[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.*

A content-neutral statute is constitutional as applied to a particular plaintiff if it is "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Determining whether a statute is content-neutral is a two-step analysis requiring an initial determination as to whether a statute is facially content-neutral. *See Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2228 (2015). A statute is facially content neutral if its application does not hinge on the topic discussed or the idea or message conveyed. *See id.* at 2227. Once a statute is deemed content neutral on its face the next step is to determine if the law can be justified without reference to the content of the regulated speech or whether the motive for the statute's adoption was the government's disagreement with the message conveyed. *See id.* at 2228. Thus, "even in a public forum the government may impose reasonable restrictions on the

time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (*quotation omitted*). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* A statute is content based if it requires an examination of the content of the message being conveyed to determine whether a violation has occurred. *McCullen*, 134 S. Ct. at 2531.

RSA 359:35, I, as amended by House Bill 366 during the 2013/14 legislative session, 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.***

RSA 659:35, I (2014) (emphasis added to highlight amendment). On its face the statute prevents a voter from using his or her ballot as evidence of how he or she intends to vote or has voted, thereby thwarting the efforts

of those parties who would seek to obtain votes by purchase or threatened harm or those who would seek profit by selling their vote. This is a reasonable content neutral restriction furthering the compelling governmental interest of ensuring the purity and integrity of our elections by protecting the long-standing tradition of the secret ballot. The statute is content neutral because its application does not depend on the content of the message conveyed, and it is justified without reference to the content of the regulated speech. Specifically, the statute prohibits the conduct of showing a marked ballot to another person, regardless of how the ballot is marked.

The trial court erroneously ruled that "the law is plainly a content-based restriction on speech because it requires the regulators to examine the content of the speech to determine whether it includes impermissible subject matter." ADD[2] 59. The trial court relied heavily on *Reed,* 135 S.Ct. 2218, in reaching this conclusion. But RSA 659:35, I's ballot restriction is distinguishable from the sign code in *Reed*. In *Reed*, an action was brought by Pastor Clyde Reed and the Good News Church against the Town of Gilbert, A.Z., claiming that the towns sign ordinance violated the First Amendment. The Town's sign code prohibited the display of outdoor signs anywhere within the Town without a permit, but exemped 23 categories of

signs. *Reed*, 135 S. Ct. at 2224. The Court found three categories of exempt signs relevant to the case. *Id.*

The first, "Ideological Sign[s]," included any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." *Id.* (*citing* Gilbert, Ariz., Land Development Code ("Code"), ch. 1, §4.402 (2005), Glossary of General Terms (Glossary), p.23). This category was treated the most favorably of the three, allowing the size to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits. *Reed*, at 2224.

The second category was Political Signs, which included "temporary sign designed to influence the outcome of an election called by a public body." *Id.* The Code allowed the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." *Id.* (*citing* §4.402(I)). These signs could be displayed up to 60 days before a primary election and up to 15 days following a general election. *Id.* at 2224-25.

[2] ADD refers to Addendum to this Brief.

The third category, which was the most relevant to the Church's signs, was "Temporary Directional Signs Relating to a Qualifying Event." This category included any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" *Id*. Under the Code, a "qualifying event" was any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Reed,* at 2225. A temporary directional sign could be no larger than six square feet. *Id.* at 10 (*citing* §4.402(P)). The signs could be placed on private property or on a public right-of-way, but no more than four signs could be placed on a single property at any time and could be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward. *Id.*

The Court struck down the Town's Sign Code finding it to be content based on its face. *Id.* at 2227. As the Court noted, the Code defined "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." *Id*. It defined "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." *Id*. And it defined "Ideological Signs" on the basis of whether a sign communicated a message or idea that did not fit in to the other categories. *Reed*, at 2227. Where the

Code subjected the signs to different restrictions based on their category, the application of the Code was entirely dependent on the communicative content of the sign. *Id*.

Unlike the sign code in *Reed*, which treated signs differently based upon their content, RSA 659:35, I, is not dependent on the content of the communication being conveyed on the ballot. Regardless of what the content of a ballot is, no voter can show their marked ballot to another person. Unlike in *Reed*, New Hampshire's ballot law does not create different categories of ballot based on their content.

The Court in *Reed* used the following analogy, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *See Reed* at 2227. Unlike the sound truck political speech restriction in the example above and the sign code in *Reed*, RSA 659:35, I does not single out specific subject matter. The statute prohibits the showing of a marked ballot, regardless of how it has been marked. This is more similar to a *total* ban on the use of sound trucks, or a blanket sign code with no exemptions, which would be content neutral regulations.

The trial court ultimately found that "the law is plainly a content-based restriction on speech because it requires the regulator s to examine the content of the speech to determine whether it includes impermissible subject matter." ADD 59. This is an incorrect reading of the statute. Regulators need not examine the content of a ballot to determine whether a voter has violated the statute. If a voter shows his or her marked ballot to anyone, that constitutes a violation of the statute regardless of how the ballot was marked. Moreover, in *Hill v. Colorado*, 530 U.S. 703 (2000), a case involving a buffer zone around health care clinics, the Court noted, "[i]t is common in the law to examine the content of communication to determine the speaker's purpose," and that "[w]e have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721. The Court reasoned that with respect to the conduct that was the focus of the Colorado statute, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether "sidewalk counselors" engaged in "oral protests, education or counseling" rather than pure social or random conversations (which were not a violation of the law). *Id.* And even in cases in which it would be necessary to review the content of the statements made, the Court has "never suggested that the kind of

cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic." *Id.* at 722. The Court noted that the statute applies to all protest, to all counseling, and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support it. *See id.* at 725. Similarly, cursory review of a ballot to determine if it is marked in any distinguishable way does not render RSA 659:35,I content based as it is not required to determine what the voter intended to convey.

In his concurrence to the *Hill* judgment, Justice Souter noted that "[u]nless regulation limited to the details of a speaker's delivery result in removing a subject or viewpoint from the effective discourse *(or otherwise fails to advance a significant public interest in a way narrowly fitting to that objective*), a reasonable restriction intended to affect only the time, place, or manner of speaking is perfectly valid." *Hill v. Colorado*, 530 U.S. 703, 736 (2000) (emphasis added). "The question is simply whether the ostensible reason for regulating the circumstances is really something about the ideas. Here, the evidence indicates that the ostensible reason is the true reason." *Id.*

In *McCullen v. Coakley*, the United States Supreme Court held that a Massachusetts statute that required a buffer zone around abortion clinics was content neutral even though it established buffer zones only at clinics that

performed abortions and although it exempted certain groups of people, like employees, from the buffer zone. Just after noting that the law will have an inevitable effect of restricting abortion-related speech more than speech on other subjects, the Court considered the Act's stated purpose to increase public safety at reproductive health care facilities, along with additional similar purposes articulated by the government's brief (public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways), and held that the law was still content-neutral. *McCullen*, 134 S. Ct. at 2531. The Court noted that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics" and to the contrary, a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers of messages but not others. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). The question in such a case is whether the law is justified without reference to the content of the regulated speech. *Id.* (quotations and citations omitted).

In dicta, the *McCullen* Court also noted that if the Act were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech then it would not be content neutral. *Id.* at 2531-32. But, like the Massachusetts law at issue in *McCullen*,

RSA 659:35, I does not concern the mere offense or discomfort of others who see a "ballot selfie" but rather is concerned with legitimate governmental interests including the secrecy of ballots and voter coercion, similar to the safety concerns that arose in *McCullen* and were held content neutral. Although the *McCullen* court ultimately held that the Massachusetts statute was not narrowly tailored enough under intermediate scrutiny and thus violated free speech guarantees, it considered the justifications behind the law in holding that it was content neutral. *McCullen*, 134 S. Ct. at 2537.

In *Burson v. Freeman*, 504 U.S. 191 (1992), in which a plurality of the Court held that a Tennessee statute prohibiting the solicitation of votes and display of campaign materials within 100 feet of a polling place on election day was content based because it limited only speech related to political campaigns, Justice Kennedy's concurring opinion noted that the regulation's justification is a central inquiry and that "government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Id*. at 212 (citing Ward, 491 U.S. at 791) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Justice Kennedy went on to note that "[d]iscerning the justification for a restriction of expression" is not always straightforward and in some cases, a censorial justification will not be

apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech. *Id.* at 213. But ultimately, "in time, place, and manner cases, the regulation's justification is a central inquiry." *Id*. Notably, although the law was found to be content based, it still survived strict scrutiny. The plurality ruled that this was the rare case where a law survived strict scrutiny because of the "widespread and time-tested consensus" that demonstrated "some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id*. at 206 (emphasis added).

Justice Scalia also concurred in the *Burson* judgment, noting that "restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot." *Id*. 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*.

Here, as in *Burson*, the State's legitimate, non-censorial justifications for protecting the secrecy of ballots and voters against coercion should be considered in determining that RSA 659:35, I is content neutral. Buteven if

strict scrutiny applies, State's interest in preventing voter intimidation and election fraud is a compelling interest which should survive such a high level of scrutiny. *Burson*, 504 U.S. at 206 (finding that a secret ballot secured in part by a restricted zone around the voting compartments is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud).

Moreover, when conducting its content-neutrality analysis of RSA 659:35, this Court should not limit its review to paragraph I of the statute, but rather read it in conjunction with paragraph II. The second paragraph of the statute, RSA 659:35, II, provides that "[n]o 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." Read together, the two paragraphs demonstrate that RSA 659:35 is not facially content-based, because its application is not dependent on the content of the communication being conveyed on the ballot. RSA 359:35, I, prohibits a voter from using his or her ballot to conveying how he or she is about to vote. RSA 359:35, II, prohibits the use of an official ballot as a manner of conveying *any other* message, thereby making RSA 659:35 a content neutral restriction on speech.

The trial court rejected this argument, simply stating that "[t]he two paragraphs regulate two different types 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 inside the polling place." ADD 61. The trial court's reasoning is in error because, first, ballots are not traditionally displayed outside the polling place. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as fora for political expression."). And second, the trial court's acknowledgement that the two paragraphs regulate more than one category of speech support's the Appellant's argument rather than defeats it. Because paragraph II prohibits the making of *any* distinguishing marks, such as letters, numbers, symbols, etc., on a ballot, it prevents a voter from using the ballot as a manner to convey *any* speech at all. For example, if a voter writes on his ballot "after voting come in to the State House Grill and check out the election day specials" and then posts an image of the ballot on Facebook, such conduct is in violation of RSA 659:35, II, because by writing "after voting come in to the State House Grill and check out the election day specials," the voter placed distinguishing marks in the form of letters upon his ballot. Because RSA 659:35, when read as a whole, prevents a voter from using a ballot to

convey *any* message other than the one message it is intended to be used for (voting in secrecy), it is content-neutral and thus should be subjected to the lower level of scrutiny.

C. The Statute Passes Both Intermediate And Strict Scrutiny Because It Furthers The State's Compelling Interest In Protecting The Secrecy Of The Ballot And Is Narrowly Tailored To Achieve That Interest

Regardless of whether RSA 659:35, I is content based or content neutral, the statute passes both intermediate and strict scrutiny because it furthers the State's compelling interest in protecting the secrecy of the ballot and is narrowly tailored to achieve that interest. When ruling that the state interest served by the statute was not sufficiently compelling, the trial court erred by placing too much weight on the lack of evidence that images of completed ballots are being used to facilitate vote buying and voter coercion schemes in New Hampshire. The plurality in *Burson* 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." (citation omitted) (emphasis added).

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

The trial court distinguished the current case from *Burson* on the basis that the technology the law targets has been around for many years, so the court believed it would be reasonable to expect that there would be some evidence that vote buying and voter coercion currently exist. Order at 34.

However, like the laws discussed by the Plurality in *Burson*, the laws in New Hampshire that were passed to fight vote buying and voter coercion have been in place since the 1890's. JA 124 (at 23:3-10). HB 366 was simply an effort to adapt RSA 659:35, I, to the technology of today in order to maintain its effectiveness. *Id.* 122 (at 16:7-16).

A voter possesses a ballot for only a short period of time. *Id.* ("The entire act of voting includes obtaining a ballot, marking the ballot and depositing the ballot in the ballot box or electronic counting device.") JA 123 (Scanlan at 20:12-15). RSA 659:35, I, prior to HB 366, regulated conduct up to the point the voter places his ballot in the ballot box. *Id.* 124 (at 21:9-13). The drafters of the earlier version of the statute could not envision a need to regulate beyond the ballot box because the voter no longer had possessed the ballot and therefore was relinquished of the direct evidence of how he voted. *Id.* 122 (at 16:7-14); 124 (at 21:17-22).

HB 366 addressed a concern that with the aid of modern technology,

such as digital photography and social media, a marked ballot is no longer under the exclusive control of the elections officials after the ballot has been cast and can still be used as evidence of how one voted. JA 122 (at 17:4-8); 124 (23:3-10). Put another way, HB 366 acts to limit the area around the voter in order to preserve the secrecy of the ballot in the modern age. The law is similar to the law under review in *Burson*, in that it has been in existence in one form or another since the 1890's. The effectiveness of the early laws makes it difficult to produce evidence of recent vote buying and voter coercion schemes. In order to do so the State's political system would have to sustain some level of damage before the legislature could take corrective action. Similar to the Court in *Burson*, this Court should permit the Legislature to respond to potential deficiencies in the electoral process with foresight rather than reactively.

Based on the decision in *Burson*, even if strict scrutiny applies, this Court should hold that the State's interest in preventing voter intimidation and election fraud is a compelling interest which should survive such a high level of scrutiny. *Id.* at 206 (finding that a secret ballot secured in part by a restricted zone around the voting compartments is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud). RSA 659:35, I, furthers the compelling governmental

interest of ensuring the purity and integrity of our elections by protecting the long-standing tradition of the secret ballot and is narrowly tailored to achieve that interest.

"For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 799). Unlike a content-based restriction of speech, it is not necessary that the content neutral regulation be the least restrictive or least intrusive means of serving the government's interests. *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 798). "But 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.'" *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 799).

As stated previously the *McCullen* court ultimately struck down the Massachusetts statute holding that it was not narrowly tailored enough under intermediate scrutiny. *McCullen*, 134 S. Ct. at 2537. However, this case can be easily distinguished from *McCullen*, in *McCullen*, the Court found that the buffer zones although serving the State's interest at the same time imposed serious burdens on the petitioner's speech. *Id.* at 2535. Noting the impact the buffer zones had on the petitioner's ability to communicate, the

Court determined that the statute went so far as to deprive the petitioners of their two primary methods of communicating with patients, conversation and leafleting. *McCullen*, 134 S. Ct. at 2536. The Court reasoned that although the 1st Amendment does not guarantee the right to a particular manner of expression, some forms such as normal conversation and leafleting on a public sidewalk were historically more closely associated to the transmission of ideas than others. *Id*.

The instant case is more closely in line with *Burson*. In *Burson*, the Court examined the history of election regulation in this country and noted it revealed a persistent battle against two evils: voter intimidation and election fraud. *Burson*, 504 U.S. at 206. The solution incorporated by all 50 States, together with numerous other Western democracies, was a secret ballot secured in part by a restricted zone around the voting compartments. *Id*. The plurality in *Burson* found that this widespread and time-tested consensus demonstrated that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

In the instant case, unlike in *McCullen*, the display of a marked official ballot is not historically associated with the communication of how one voted. It has been over 120 since this State has adopted the official

ballot system. JA 004-6, (1891 N.H. Laws Ch. 49, Sec. 10). Likewise, for over 120 years it has been illegal for a voter to display his marked ballot as evidence of how he was about to vote. *Id.* It has only been since the advent of digital photography and social media in the recent past that has given rise to the use of one's ballot as a form of communication. HB 366 was introduced and enacted to ensure that the ballot remained secret thereby preventing voter intimidation, vote buying and maintaining the integrity of our election. HB 366 is narrowly tailored to pass any level of scrutiny both intermediate and strict.

VI. CONCLUSION

For the foregoing reasons this Court should reverse the decision of the trial court and hold that RSA 359:35, I does not violate the First Amendment.

If the court desires oral argument on this case, Stephen G. LaBonte, Assistant Attorney General will present the argument for the Appellee.

Respectfully submitted,

WILLIAM M. GARDNER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NEW HAMPSHIRE

By his attorney,

JOSEPH A. FOSTER
ATTORNEY GENERAL

/s/ Stephen G. LaBonte
Stephen G. LaBonte
First Circuit Bar # 1171810
Assistant Attorney General
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3650
stephen.labonte@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were delivered this 7th day of March 2016 to Gilles Bissonnette, Esquire and William Christie, Esquire, counsel for the Appellees via the Federal Court's ECF filing system.

/s/ Stephen G. LaBonte
Stephen G. LaBonte

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief of William Gardner, New Hampshire Secretary of State complies with the type and limitations in Rule 32(A) (5) and the word limitation set forth in Rule 32(A)(7)(B)(i) of the Federal Rules of Appellate Procedure. The brief filed consists of 7,525words.

/s/Stephen G. LaBonte
Stephen G LaBonte # 117180

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

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

[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.

Declaration of Gilles Bissonnette, Esq. in Support of Plaintiffs' Motion for 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.

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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.

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

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

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,

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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.

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 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,

[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).

drawing all reasonable inferences in its favor. See Navarro v. Pfizer Corp., 261 F.3d 90, 94 (1st Cir. 2001).

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. 2729, 2738 (2011) ("The state must specifically identify an 'actual problem' in need of solving . . . ." (quoting Playboy, 529 U.S. at 822-23)); see

[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.

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

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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,

absence of evidence when speech restrictions are at issue. 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

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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 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.

"[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 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

cc: William E. Christie, Esq.
Gilles Bissonnette, Esq.
Stephen G. Labonte, Esq.
Anne M. Edwards, Esq.

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

APPELLEE'S BRIEFING NOTICE

Issued: March 10, 2016

Appellee's brief must be filed by **April 11, 2016**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **July/August, 2016** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the appellee not being heard at oral argument. See 1st Cir. R. 3 and 45.

Margaret Carter, Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT
John Joseph Moakley
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210
Case Manager: David Krinsky - (617) 748-4209

cc:
Gilles R. Bissonnette
William E. Christie
Stephen G. LaBonte
Laura E. B. Lombardi