No. 15-2021

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LEON H. RIDEOUT, ANDREW LANGLOIS, AND BRANDON D. ROSS
Plaintiffs-Appellees,

v.

WILLIAM M. GARDNER, N.H. Secretary of State, in his official capacity,
Defendant-Appellant

On Appeal from the United States District Court
For the District of New Hampshire

BRIEF OF APPELLEES, LEON H. RIDEOUT, ANDREW LANGLOIS, AND BRANDON D. ROSS

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CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is required under Rule 26.1(a) of the Federal Rules of Appellate Procedure.

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This is an important case under the First Amendment challenging the facial constitutionality of a statute that bans a person from publishing a photograph of his or her marked ballot reflecting "how he or she has voted" on online social media platforms. This is a case of first impression among circuit courts in the United States. Indeed, the law being challenged here is the first in the country to explicitly ban all such online political messages made outside the polling place at any time. Accordingly, pursuant to Local Rule 34, Appellees-Plaintiffs submit that oral argument would assist the Court in its deliberations and disposition of this important matter, and, therefore, request oral argument.

I. STATEMENT OF THE ISSUE

Did the District Court correctly determine that HB366's amendment to N.H. Rev. Stat. Ann. § ("RSA") 659:35(I)—which bans a person from publishing on online social media platforms a photograph of his or her marked ballot reflecting "how he or she has voted"—violates the First and Fourteenth Amendments on its face because it is "vastly overinclusive" and because the State "failed to demonstrate that less speech-restrictive alternatives will be ineffective to address the state's concerns"? See Aug. 11, 2015 Dist. Ct. Order, State's Addendum ("ADD") 74.

II. STATEMENT OF THE CASE

This case proves the truth of the adage that "a picture is worth a thousand words." In furtherance of this principle, which is embedded in the First Amendment and applies to online speech, Plaintiffs ask this Court to affirm the District Court's declaration that HB366 is facially unconstitutional on the grounds that it violates free speech rights. HB366 is a content-based ban on innocent political speech over the Internet that is not narrowly tailored to the State's interest in addressing vote bribery and voter coercion.

A. Statement Of The Facts

1. HB366 And The Purported Governmental Interests Behind It.

Effective September 1, 2014, New Hampshire amended RSA 659:35(I) to

state the following: "No voter shall allow his **or her** ballot to be seen by any person with the intention of letting it be known how he **or she** is about to vote **or how he or she has voted** except as provided in RSA 659:20.[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**." See H.B. 366, 2014 Sess. (N.H. 2014) (enacted) (bolded and underlined language reflect the modifications that became effective on September 1, 2014) (hereinafter, "HB366"). A willful violation of this statute is a violation-level offense. RSA 659:35(IV). Violations are punishable by a fine not to exceed $1,000. RSA 651:2(IV)(a).

Under the prior version of RSA 659:35(I), it was only unlawful to display one's marked ballot reflecting how one was "about to vote." As a result, the prior law only burdened speech on Election Day inside the polling place between the moment a voter marked the ballot and the moment the voter placed the ballot in the ballot box. See also State's Br. at 3, 6, 29 (noting that the prior law only regulated "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"). This law dates back to the early 1890s, and was codified as RSA 659:35(I) in 1979.

HB366's amendment to RSA 659:35(I) originated with the New Hampshire

[1] RSA 659:20 allows a voter who needs assistance marking his or her ballot to receive assistance.

Secretary of State's Office, which drafted its initial language and secured the sponsorship of Democratic Representative Timothy Horrigan. Joint Appendix ("JA") 121-22, 126 (Pls.' Ex. C, Scanlan Depo. 10:14-17; 13:2-22; 29:10-14). The justification behind HB366 was to address vote buying and voter coercion. See, e.g., JA242-247 (Pls.' Ex. G, HB366 Legislative History at 113-118, Nov. 20, 2013 House Election Law Committee Report).

According to Deputy Secretary of State David M. Scanlan's April 9, 2014 testimony before the Senate Public and Municipal Affairs Committee, HB366 was necessary to update the law in light of modern technology to address vote buying, which he argued was "rampant" in the late 1800s. He expressed fear that "we have this great new technology now that allows people to go in the polling place, to take an image of their ballot before they put it in the ballot box, and then distribute it instantly to whomever and wherever they want to distribute it. [This] creates a new opportunity to go back to the days prior to the 1890s when votes could be bought and purchased." Pls.' Ex. H (Recording of Apr. 9, 2014 Senate Public and Municipal Affairs Hearing) (13:35; 15:34). Deputy Secretary Scanlan did not cite a single incident of vote buying in New Hampshire since the late 1800s, let alone a vote buying transaction that was consummated by the display of a marked ballot on the Internet. See also JA108-15 (Pls.' Ex. B, Apr. 9, 2014 Senate Public and Municipal Affairs Hearing Report, Gardner Ex. 3); JA187-94

(Pls.' Ex. G, HB366 Legislative History at 58-65); JA293 (Pls.' Ex. J, Sept. 20, 2014 New Hampshire Union Leader Article).

Similarly, in April 9, 2014 testimony before the Senate Public and Municipal Affairs Committee, Representative Horrigan stated that HB366 was designed, in part, to address a "scheme [where] somebody is trying to buy votes and they … make you take a picture of their ballot on their cell phone and go out and show it to a guy and he hands you a $5 or $10 bill." Pls.' Ex. H (Recording of Apr. 9, 2014 Senate Public and Municipal Affairs Hearing) (5:17). Representative Horrigan further testified that he did not know if anyone had "done such a scheme," but that it was worth making it illegal anyway. Id. (5:30); see also JA187-94 (Pls.' Ex. G, HB366 Legislative History at 58-65); JA279-92 (Pls.' Ex. I, Rep. Horrigan's Website Addressing HB366).

Representative Mary Till, a member of the House Election Law Committee, also testified in favor of HB366 before the Senate Public and Municipal Affairs Committee on April 9, 2014. She argued that the law would help ensure that "no one is coerced to vote in a particular way." Pls.' Ex. H (Recording of Apr. 9, 2014 Senate Public and Municipal Affairs Hearing) (8:14); see also JA187-94 (Pls.' Ex. G, HB366 Legislative History at 58-65). She expressed concern that "someone with authority over the voter—for example, an employer, a union [representative], or a spouse—could coerce the voter into providing a photo of his

or her completed ballot to prove that they voted the way they were told to vote." Id.

After being passed by the legislature, Governor Maggie Hassan signed HB366 into law on June 11, 2014. HB366 went into effect on September 1, 2014. JA177.

2. There Is No Evidence Of Vote Buying Or Voter Coercion In New Hampshire Since The Late 1800s.

The State has presented no evidence indicating that vote buying or voter coercion has occurred in New Hampshire since the late 1800s, let alone shown that a photograph of a marked ballot has ever been displayed online in New Hampshire in furtherance of a crime. JA294-511 (Pls.' Ex. K, Sept. 22, 2014 Right-to-Know Request to Attorney General's Office and Response); JA512-28 (Pls.' Ex. L, Sept. 22, 2014 Right-to-Know Request to Secretary of State's Office and Response). The Secretary of State's Office has admitted that it has not received a complaint or concern regarding a voter displaying a photograph of his or her marked ballot to a party buying or coercing the vote in New Hampshire from 1976 to the present. Nor does that Office recall any specific incidents of vote buying or voter coercion from 1976 to the present. JA102-03, 151-52 (Pls.' Exs. B and D, State's Int. Resp. Nos. 18, 20; Gardner Ex. 1; Scanlan Ex. 2); JA124, 130 (Pls.' Ex. C, Scanlan Depo. 23:11-22; 47:13-48:10).

3. The Plaintiffs, And The State's Enforcement Of HB366's Amendment To RSA 659:35(I) After September 1, 2014.

Since HB366's amendment to RSA 659:35(I) became effective on September 1, 2014—but prior to the District Court's August 11, 2015 order declaring HB366 unconstitutional—the New Hampshire Attorney General's Office actively investigated individuals who posted their marked ballots on the Internet, regardless of whether this speech was related to the State's asserted interests in passing HB366. At the time of the District Court's August 11, 2015 order, the State was investigating four individuals for alleged violations of HB366, which included the three Plaintiffs in this case. The Plaintiffs have entered into agreements with the State to toll the three-month statute of limitations period pending the outcome of this case. JA529-31 (Pls.' Ex. M, 2015 HB404 fiscal note stating that the Department of Justice "currently has four such pending complaints"); RSA 625:8(I)(d).

a. Plaintiff Representative Leon H. Rideout

Plaintiff Leon H. Rideout is a member of the House of Representatives representing District 7 in Coos County. He is a 26-year veteran of the U.S. Marine Corps. who served in both Operation Desert Shield/Desert Storm and the Iraq War. He is also a member of the Board of Selectmen for Lancaster, New Hampshire. See JA532-34 (Pls.' Ex. N, Rideout LinkedIn Profile).

Representative Rideout voted during the September 9, 2014 Republican

primary election in Lancaster where he was on the ballot. During that election, he took a photograph of his marked ballot with his phone prior to casting the ballot. The marked ballot reflected that he voted for himself as well as other Republican candidates. Hours after the ballot was cast, Representative Rideout posted the photograph on Twitter, along with the text "#COOS7 vote in primary 2014#nhpolitics." Amended Verified Complaint ("AVC") ¶¶ 31-32 (Dist. Ct. Docket No. 5); see also JA116, 157 (Pls.' Exs. B and D, Rideout Twitter Posting, Gardner Ex. 4, Scanlan Ex. 3). He also posted the photograph to his House of Representatives Facebook page, which "is intended to keep the resident[s] of COOS 7 informed of any and all [l]aws happening on the state level that could [affect] their lives." JA159-61 (Pls.' Ex. D, Facebook Page in Rideout Investigatory File of Attorney General's Office, Scanlan Ex. 4); see also JA535-56 (Pls.' Ex. O, Complete Attorney General Rideout File); JA558-59 (Pls.' Ex. P, Admission Response Nos. 7-9).

In a September 11, 2014 Nashua Telegraph article, Representative Rideout explained: "I did it to make a statement …. I had promised a few other [representatives] that I would post my ballot, and I did …. I think [HB366 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." JA565-66 (Pls.' Ex. Q, Sept. 11, 2014 Nashua Telegraph Article). It is not disputed that

Representative Rideout's posting had nothing to do with vote buying or voter coercion. AVC ¶ 32.

The same day this Nashua Telegraph article was published on September 11, 2014, the Secretary of State's Office sent an email to the Attorney General's Office linking the article and Representative Rideout's Facebook page containing the ballot photograph. The Attorney General's Office then initiated an investigation of Representative Rideout for violating HB366's terms. JA158-65 (Pls.' Ex. D, Partial Rideout Attorney General File, Scanlan Ex. 4); see also JA535-56 (Pls.' Ex. O, Complete Attorney General Rideout File); JA558-59 (Pls.' Ex. P, Admission Response Nos. 7-9); JA131 (Pls.' Ex. C, Scanlan Depo. 51:12-15).

Paul Brodeur, an investigator from the Attorney General's Office, called Representative Rideout and requested an interview. The interview was conducted on September 16, 2014. During the interview, which was recorded, Representative Rideout admitted that he published a photograph of his marked ballot on the Internet. He explained his position as follows to Mr. Brodeur:

> I don't agree with the premise …. I just think it's a free speech thing. If somebody wants to show their ballot they should be able to show their ballot …. I do think there's a constitutional question ... on the law. I spoke out against it when it [came] to the floor of the House. And one of the things that I have attempted to do since I've been a State Rep is keep my constituents informed of different things going on within the State. And I can tell you so far the response has been as the word has got out … is a lot of support and a lot of shock that this law even exists on the books. And it

> was just to make people aware. Most of I'd say probably better than 90-99 percent of the people in the State of New Hampshire are not aware of this RSA.

JA538 (Pls.' Ex. O, Interview Transcription in Attorney General Rideout File); Pls.' Ex. R (Rideout Interview Recording) (5:10); see also JA565-66 (Pls.' Ex. S, Sept. 19, 2014 Nashua Telegraph Article); AVC ¶¶ 32-33. Representative Rideout also informed Mr. Brodeur that the poster placed at the polls supposedly informing voters of HB366's terms was a "totally ineffective means to get the word out." JA538 (Pls.' Ex. O, Interview Transcription in Attorney General Rideout File); see also Pls.' Ex. R (Rideout Interview Recording) (6:11).

Days after the filing of this lawsuit on October 31, 2014, the Attorney General's Office threatened Representative Rideout with prosecution under RSA 659:35(I) and prepared a complaint to be served in light of the three-month statute of limitations period. JA535 (Pls.' Ex. O, Unserved Complaint in Attorney General Rideout File). No complaint was ultimately served after Representative Rideout and the other Plaintiffs in this case entered into agreements with the State to toll the statute of limitations period for the duration of this litigation.

2. Plaintiff Andrew Langlois

The Attorney General's Office is also investigating Plaintiff Andrew Langlois for violating HB366's terms. Mr. Langlois voted during the September 9, 2014 Republican primary election in Berlin, New Hampshire. Because Mr.

Langlois did not approve of his Republican choices for United States Senate, he wrote the name "Akira" as a write-in candidate. "Akira" is the name of Mr. Langlois's dog that passed away just days before the primary election. Prior to casting the marked ballot, Mr. Langlois took a photograph of the ballot's Senate section with his phone while in the ballot booth. He then went home and posted the photograph on Facebook, along with commentary reflecting his frustration with his Republican choices for Senate. AVC ¶¶ 35-36. The commentary stated, in part: "Because all of the candidates SUCK, I did a write-in of Akira (my now decease[d dog] …." JA567, 568 (Pls.' Ex. T and U, Langlois Photo and Posting); JA117-18 (Pls.' Ex. B, Langlois Photo and Incomplete Posting; Gardner Ex. 5). In short, Mr. Langlois's posting was a protest against his choices for public office—a political message that would have been far less salient without the photograph indicating that his deceased dog "Akira" was his candidate of choice. AVC ¶¶ 35-36. It is not disputed that Mr. Langlois's posting had nothing to do with vote buying or voter coercion. Id. ¶ 36.

After the primary election, Mr. Langlois received a phone call from investigator Paul Brodeur. Mr. Brodeur explained that Mr. Langlois was being investigated for posting his ballot on social media in violation of RSA 659:35(I). At first, Mr. Langlois could not believe that what he did was illegal. He told Mr. Brodeur that the phone call must be some sort of "joke." Mr. Langlois expressed

surprise that the State would be investigating someone for posting a photograph of a ballot indicating that a voter had voted for his dog. Id. ¶ 37.

3. Plaintiff Brandon D. Ross

Plaintiff Brandon D. Ross voted during the September 9, 2014 Republican primary election in Manchester, New Hampshire. Mr. Ross was a candidate on the ballot at the time, as he was running to be one of two Republican nominees to represent Hillsborough County District 42's two seats in the New Hampshire House of Representatives (which represents Wards 1 through 3 in Manchester). After Mr. Ross marked his ballot with his choices and prior to the ballot being cast, he took a photograph of the ballot with his phone. His marked ballot reflected that he was voting for himself, as well as other Republican candidates. Mr. Ross took this picture to keep a record of his vote, to assist him in the future with remembering other candidates for whom he voted, and to preserve the opportunity to show his marked ballot to others as a means of demonstrating his support for certain political candidates. Mr. Ross was aware of HB366's amendment to RSA 659:35(I) when he took this photograph, but he did not immediately publish the photograph because of the law's penalties. AVC ¶ 39. This demonstrates the chilling effect of the law.

Over one week later, Mr. Ross became aware that the New Hampshire Attorney General's Office was investigating voters for violating HB366's terms.

In response, on September 19, 2014, Mr. Ross posted the photograph of his marked ballot on Facebook with the text "Come at me bro." JA569 (Pls.' Ex. V, Ross Photo and Posting); see also JA570-73 (Pls.' Ex. W, Partial Attorney General Ross File); JA560 (Pls.' Ex. P, Admission Response Nos. 10-11). The text, in part, symbolized his political objection to HB366 on free speech grounds and his deep concern about the Attorney General's investigations of legitimate voters. In short, the picture, combined with the text, was a form of political protest and a statement that he was willing to risk prosecution in order to stand up for the free speech rights of himself and others. AVC ¶ 40. It is not disputed that Mr. Ross's posting had nothing to do with vote buying or coercion. Id. ¶ 41.

Mr. Ross is currently being investigated by the Attorney General's Office for his posting. This investigation was triggered by a complaint filed by the sponsor of HB366, Democratic Representative Timothy Horrigan, with the Attorney General's Office on October 2, 2014. JA570-73 (Pls.' Ex. W, Partial Attorney General Ross File) (Rep. Horrigan alleging a "violation of RSA 659:35 by Atty. Brandon Ross").

B. Relevant Procedural History

After the New Hampshire Attorney General's Office commenced investigations of Plaintiffs who posted their marked ballots on the Internet during September 9, 2014 primary election, Plaintiffs filed a civil action in the Federal

District Court for the District of New Hampshire on October 31, 2014 seeking a declaration that HB366's amendment to RSA 659:35(I) violates the First and Fourteenth Amendments.

After the Attorney General's Office stated publicly that it would enforce the law against those who posted online photographs of their marked ballots during the November 4, 2014 general election, Plaintiffs moved for a preliminary injunction on November 12, 2014. A hearing was held on this Motion on November 21, 2014. Plaintiffs ultimately withdrew their Motion after the District Court and the parties agreed to have this case heard on the merits on an expedited basis.

Following expedited discovery, the parties filed cross motions for summary judgment in the spring of 2015. On June 8, 2015, the District Court held a hearing on the motions. After the United States Supreme Court decided Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) on June 18, 2015, the District Court requested that the parties file supplemental memoranda addressing how Reed impacts the legal issue in this case. The parties submitted their respective supplemental memoranda on June 25, 2015.

On August 11, 2015, the District Court issued a thoughtful and comprehensive 42-page Memorandum and Order declaring that HB366's amendment to RSA 659:35(I), on its face, violates the First and Fourteenth

Amendments. The District Court ruled that the law was content based, thereby triggering strict scrutiny review. ADD57-64. Applying strict scrutiny, the Court held that HB366 was not narrowly tailored to serve a compelling governmental interest. ADD65-74. The Court concluded: "Because [HB366] 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." See ADD74. Accordingly, the Court granted Plaintiffs' motion for summary judgment and denied the State's cross-motion for summary judgment.

III. SUMMARY OF THE ARGUMENT

HB366's amendment to RSA 659:35(I) bans a person from displaying a photograph of a marked ballot reflecting "how he or she has voted," including on the Internet through social media platforms like Twitter, Facebook, and Instagram. The law contains no exceptions. Willfully engaging in this form of innocent, political speech is penalized as a violation-level offense punishable by a fine of up to $1,000. HB366 is also unprecedented. New Hampshire is the first state in the country to update its decades-old election laws during the Internet age with the specific intent to ban this form of online political speech occurring outside the polling place.

HB366 ignores that displaying a photograph of a marked ballot on the

Internet is a powerful form of political speech that conveys various constitutionally-protected messages that have no relationship to vote buying or voter coercion. For example, an 18-year-old, newly-minted voter who is excited about voting in her first presidential election and wishes to publicly show on Facebook her enthusiastic support for a candidate using the powerful imagery of the very document she used to participate in the democratic process is prohibited from doing so. HB366 would also ban political candidates like Plaintiffs Leon H. Rideout and Brandon D. Ross from publishing on social media photographs of their marked ballots reflecting that they voted for themselves to demonstrate pride and enthusiasm in their candidacy.

As the District Court correctly held, HB366 is a content-based restriction on political speech, as the law prohibits the revelation of specific content—namely, a marked ballot demonstrating how a person "has voted." Thus, this law must be narrowly tailored to serve a compelling governmental interest. Applying strict scrutiny, the District Court was correct to hold that the State failed to show that there is a compelling governmental interest in preventing vote buying and voter coercion through the photographic display of a marked ballot on the Internet. The State did not produce a single piece of evidence demonstrating that HB366 is necessary. At best, HB366 addresses only an abstract, hypothetical problem that fails to reach the required "compelling" threshold.

Even if addressing vote buying and voter coercion using an online photograph of a marked ballot is a compelling governmental interest (which it is not), the District Court correctly held that HB366 cannot possibly be viewed as narrowly tailored because it indiscriminately bans all speech using a photograph of a marked ballot. This includes voluntary political speech on matters of public concern occurring outside the polling place (including in one's home) that bears no nexus to the State's purported interest in enacting the law. Prior to proposing this law, the Secretary of State's Office conducted no studies, investigation, or inquiry into whether there were more narrowly tailored ways of addressing vote buying or voter coercion without also suppressing innocent political speech. Here, the more tailored approach is obvious: to investigate and prosecute vote-buying transactions and incidents of voter coercion—conduct which is already illegal under federal and New Hampshire law. And if the State wishes to further regulate this area, a more tailored approach would be to enact a law that bans the photographic display of a marked ballot as part of a vote buying or voter coercion scheme.

As this Court recently noted, "First Amendment rights are fragile, and it is not only the occasional abuse of censorship power but also the threat inherent in the existence of that power that may chill protected expression." Van Wagner Boston, LLC v. Davey, 770 F.3d 33, 34 (1st Cir. 2014). This case goes beyond

censorship and chill. Plaintiffs may be prosecuted for engaging in innocent political speech if HB366 is upheld. This Court should affirm the judgment of the District Court.

IV. THE ARGUMENT

Under the First Amendment, a statute is overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." United States v. Stevens, 559 U.S. 460, 473 (2010) (internal quotation marks and citations omitted). This Court's inquiry is not limited to the application of the challenged law to the particular plaintiffs before it, as "[l]itigants … are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).[2]

Content-based restrictions are presumptively invalid, see R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992), and are permitted only if they are narrowly tailored to promote a compelling governmental interest. See Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015). The burden to satisfy this standard falls squarely on the government. See McCullen v. Coakley, 134 S. Ct. 2518, 2537-40

[2] The State argued before the District Court that HB366 does not implicate speech. The State has not made this argument on appeal, and therefore it is waived.

(2014) ("To meet the requirement of narrow tailoring, the government must demonstrate [that the speech restriction meets the relevant requirements]) (emphasis added); Cutting v. City of Portland, 802 F.3d 79, 91 (1st Cir. 2015) (same); United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (collecting cases). The State has failed to meet its burden here.

A. HB366 Is Content-Based, And Therefore Strict Scrutiny Applies

As the District Court correctly held, HB366 is content based. ADD57-64. In reaching this conclusion, the District Court properly relied upon the United States Supreme Court's recent decision in Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). There, the Supreme Court held that, irrespective of the motive behind a law, a law is content based "on its face" if it "defin[es] regulated speech by particular subject matter" or by "function or purpose." Id. at 2227 (internal quotation marks omitted). Importantly, the Reed Court concluded that, where a law is content based "on its face," courts "have no need to consider the government's justifications or purposes for enacting [it] to determine whether it is subject to strict scrutiny." Id. Moreover, a law is content based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." See McCullen, 134 S. Ct. 2518,

2531 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)); see also Matthews v. Town of Needham, 764 F.2d 58, 60 (1st Cir. 1985) (sign code found content-based where it facially banned political signs but permitted "for sale," professional office, and religious and charitable cause signs).

Reed further explained that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." Reed, 135 S. Ct. at 2228 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)). The Court expressly disapproved as "incorrect" any suggestion "that a government's purpose is relevant even when a law is content based on its face." Id.; see also id. at 2229 ("[W]e have repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose."). The Court added that "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." Id. at 2228. Put another way, a "censorial" purpose is sufficient, but not necessary, to deem a law content based. And there is good reason for this rule: "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." Id. at 2229.

Given this clearly-established law, this Court should summarily reject the

State's inappropriate attempt to circumvent Reed by citing pre-Reed cases (including Ward v. Rock Against Racism, 491 U. S. 781 (1989), Hill v. Colorado, 530 U.S. 703 (2000), and non-precedential concurring opinions) for the proposition that this Court can consider whether HB366's justifications are "legitimate" and "non-censorial" in determining if the law is content based. See State's Br. 11, 15-16, 22, 24 (arguing that "the State's legitimate, non-censorial justifications for protecting the secrecy of ballots and voters against coercion should be considered in determining that [HB366] is content neutral"). Again, Reed expressly rejected this approach, concluding that Ward does not "suggest[] that a government's purpose is relevant even when a law is content based on its face." Reed, 135 S. Ct. at 2218. This Court must as well. Any such "legitimate, non-censorial justifications" are irrelevant under Reed. This Court must first consider whether HB366 is content based before turning to the legislature's purported justifications for enacting it. See Reed, 135 S. Ct. at 2227, 2228 ("In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.").[3]

[3] This Court cannot rely upon its prior decision in Thayer v. City of Worcester. 755 F.3d 60 (1st Cir. 2014), vacated and remanded, 135 S. Ct. 2887 (2015). In Thayer, this Court reasoned that "[e]ven a statute that restricts only some expressive messages and not others may be considered content-neutral when the distinctions it draws are justified by a legitimate, non-censorial motive." Id. at 68. The United States Supreme Court's subsequent decision in Reed rejected this reasoning, concluding that the government's purpose in enacting a speech

After Reed, there can be little doubt that HB366 is a content-based law to which strict scrutiny must be applied. HB366, on its face, prohibits the revelation of specific content—namely, a marking on a ballot demonstrating how a voter "has voted." A ballot omitting this content is not subject to HB366's prohibitions. JA130 (Pls.' Ex. C, Scanlan Depo. 46:9-14); JA74 (Pls.' Ex. A, Gardner Depo. 116:22-118:14). Whether an individual runs afoul of HB366 depends entirely on whether the individual's ballot indicates how that person voted. A message displaying a photograph of a blank ballot, for example, is excluded from HB366's reach. As the District Court correctly noted in deeming the law content based:

> [T]he law under review is content based because it restricts speech on the basis of subject matter. The only digital or photographic images that are barred by RSA 659:39, I are images of marked ballots that are intended to disclose how a voter has voted. Images of unmarked ballots and facsimile ballot 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.

ADD59.

HB366 is also "plainly a content-based restriction on speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter." Id.; see also McCullen, 134 S. Ct. at 2531. For example, a voter would not run afoul of HB366 by posting on social

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restriction is irrelevant in determining whether the restriction is content based. After Reed, the Supreme Court vacated Thayer and remanded the case for further proceedings. See 135 S. Ct. 2887 (2015); see also Cutting v. City of Portland, 802 F.3d 79, 82 n.2 (1st Cir. 2015) (explaining history of Thayer after Reed, and deciding that case "without regard to Thayer").

media a photograph of a blank, unmarked ballot in a voting booth with the text in the post: "I am excited to now vote for Hillary Clinton." But a voter would run afoul of the law by posting on social media a photograph of a ballot where Hillary Clinton was specifically marked as the voter's choice. To determine whether either of these messages is disfavored under HB366 would require a government official to specifically review the contents of the message itself.

Reed also defeats the State's argument that HB366 is content neutral because its prohibition does not depend on "how the ballot is marked." See State's Br. at 12, 16, 19. This argument conflates viewpoint discrimination with distinctions based on content. If a violation of the challenged law was, in fact, dependent on how one voted, the law would be viewpoint based. But even where the challenged law does not hinge on how the ballot is marked, it is nonetheless content based because it hinges on the ballot's content—namely, whether the ballot is marked for a candidate reflecting how one voted. See Burson v. Freeman, 504 U.S. 191, 197 (1992) (buffer zone banning speech related to a campaign near a polling place was content based even where violation did not depend on the type of campaign speech engaged in and regardless of whether the law was passed with legitimate justifications). Put another way, like the sign restrictions in Reed, HB366 "singles out specific subject matter for differential treatment"—i.e., a voluntary display of a marked ballot showing how a voter "has

voted"—even though it does not target viewpoints within that subject matter. See Reed, 135 S. Ct. at 2230. Thus, it is consequently "a paradigmatic example of content-based discrimination," see id., no matter what benign (and irrelevant) motives the State claims to have had for its adoption. As the District Court accurately ruled, this conclusion is not altered by the fact that HB366 leaves Plaintiffs and other speakers "with arguably less effective means of speaking on the subject." ADD60.

The State's reliance on Hill v. Colorado, 530 U.S. 703 (2000) and McCullen v. Coakley, 134 S. Ct. 2518 (2014) in arguing that HB366 is content neutral is misplaced. See State's Br. at 20-23. In Hill, the United States Supreme Court upheld a statute which prohibited a person within 100 feet of an entrance to a healthcare facility from knowingly approaching within 8 feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person …." Id. at 707. This was a content-neutral time, place, and manner regulation because the statute restricted only "the places where some speech may occur." Id. at 719. The same was true of Massachusetts' 35-foot buffer zone around reproductive health care facilities in McCullen: it was content-neutral because the law did "not draw content-based distinctions on its face" and, thus, did not require enforcement authorities to "examine the content of the message that is conveyed to determine

whether" a violation has occurred. McCullen, 134 S. Ct. at 2531.

Like the de facto total ban on face-to-face communications imposed within the buffer zones in Hill and McCullen, HB366 imposes a total prohibition of a compelling form of photographic communication. But, unlike these buffer zones, HB366's ban goes even further by targeting a specific message for blanket exclusion that cannot be conveyed anywhere at any time under any circumstances—namely, any message using a photograph of a ballot marked for a particular candidate. While the ban in McCullen allowed face-to-face communications outside the buffer zone, HB366 bans all speech made through a photograph of a marked ballot everywhere at any time. Unlike these circumscribed buffer zones where the contours of the message itself were irrelevant, the only way to determine whether a message is proscribed under HB366 is to examine the message itself—namely, the image of the ballot.

Finally, the State argues that HB366's amendment to paragraph I of RSA 659:35 should be read in conjunction with paragraph II of RSA 659:35, which prohibits a voter from placing "a distinguishing mark upon his or her ballot." See State's Br. at 25-27. Read together, the State contends that HB366 is content neutral because these laws collectively "prevent[] 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)." Id. at 26-27 (emphasis in original). This argument can be

easily rejected for four reasons. First, this argument has been waived. The State never presented this argument in discovery or during initial summary judgment briefing—and instead manufactured it at the eleventh hour 12 days after the June 8, 2015 oral argument. See State's June 25, 2015 Supp. Br. (Dist. Ct. Docket No. 27) (making argument for the first time); JA100, 149 (Pls.' Exs. B and D, State's Int. Resp. No. 7; Gardner Ex. 1; Scanlan Ex. 2) (State declines to make this argument in interrogatories addressing whether HB366 is content neutral); Hartford Cas. Ins. Co. v. McJ Clothiers, 54 Fed. App'x 384, 388 (4th Cir. 2002) ("[W]here parties do not disclose, in response to interrogatory requests, opinions to which witnesses will testify, the undisclosed testimony is inadmissible.").

Second, this argument is wrong. Reed requires this Court to examine HB366 on its face in determining whether it is content based. Indeed, the District Court correctly rejected the State's belated argument out of hand: "The two paragraphs simply regulate two different categories of speech …. Because paragraph I regulates speech based on the content conveyed, paragraph II cannot save it from being a content-based restrictions." ADD61.

Third, HB366 and paragraph II cannot be read together, as they are fundamentally different. HB366, on its face, is a speech restriction regulating the photographic display of a ballot indicting how one has voted. Conversely, paragraph II does not regulate the "display" of a ballot with a "distinguishing

mark." Instead, it bans the making of a distinguishing mark altogether on a ballot, even if the ballot is not shown to anyone. Arguably, paragraph II does not always implicate expressive activity. See United States v. O'Brien, 391 U.S. 367 (1968).

Fourth and finally, even if these two statutes are viewed together as a global speech restriction, HB366 is still content based because, again, it requires enforcement authorities to "examine the content of the message that is conveyed"—here, by examining the photograph of the ballot itself. See McCullen, 134 S. Ct. at 2531; see also Indiana Civil Liberties Union v. Indiana Sec. of State, at 7-8 (ban on distribution of photograph of voter's ballot—regardless of whether it has any markings—is content based). In addition, if one reads paragraphs I and II together, the State would not be regulating all possible messages using a ballot equally. Put another way, these laws would not be collectively "prevent[ing] a voter from using the ballot as a manner to convey any speech at all." See State's Br. at 26. Instead, the State would have singled out two particular messages for prohibition using a ballot—photographs of ballots indicating how one has voted that are traditionally disseminated outside the polling place (HB366's amendment to paragraph I) and ballots with distinguishing marks made while in the polling place (paragraph II)—while not banning, for example, messages using the photographs of blank ballots with no text or

markings at all. This unequal treatment proves HB366's content-based nature.[4]

Accordingly, HB366's amendment to RSA 659:35(I) must be subjected to strict scrutiny review.

B. HB366 Does Not Serve A Compelling Governmental Interest.

To meet its burden of demonstrating that a speech restriction serves a compelling governmental interest, the government must show that the restriction addresses "an actual problem in need of solving." See Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011); see also Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla, 490 F.3d 1, 18 (1st Cir. 2007) ("We cannot conclude that [the government] has a legitimate state interest in fixing a problem it has not shown to exist."). To satisfy this requirement, the State must point to sufficient

[4] Though not addressed by the District Court because it was unnecessary, HB366 triggers strict scrutiny for yet another independent reason: the law forbids "the dissemination of truthful and lawfully obtained information on a matter of public concern." Florida Star v. B.J.F., 491 U.S. 524, 541 (1989). Thus, the law "must meet a daunting standard"—namely, "punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order[.]" Id. (statute prohibiting instruments of mass communication from publishing the names of rape victims failed strict scrutiny review); see also Snyder v. Phelps, 562 U.S. 443, 460 (2011) (public speech, even if it is outrageous or hurtful, is protected and immune from civil liability under the First Amendment if it, in part, addresses "matters of public import on public property, in a peaceful manner"). Here, it cannot seriously be disputed that speech concerning an election is a "matter of public concern." The speech being suppressed by this law is not just imagery depicting the identity of the candidate for whom a person voted; rather, the law bans individuals from voluntarily using photographs of marked ballots to more broadly engage in political commentary and discuss both their experience at the polls and reasons for voting for certain candidates.

evidence in the legislative history or in the record to show that a problem actually exists. See Playboy Entm't Grp., 529 U.S. at 822 ("the Government must present more than anecdote and supposition" in application of strict scrutiny); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."); Turner Broad. Sys. v. FCC, 512 U.S. 622, 667 (1994) (explaining that, without evidence of an actual problem, "we cannot determine whether the threat [asserted by the government] is real enough" to survive intermediate scrutiny).

Here, the only interest that the State claims HB366 advances is "to prevent voter fraud in the form of vote buying, intimidation, coercion and bribery." JA100, 149 (Pls.' Exs. B and D, State's Int. Resp. No. 8; Gardner Ex. 1; Scanlan Ex. 2); JA242-49 (Pls.' Ex. G, HB366 Legislative History at 113-20, Nov. 20, 2013 Election Law Committee Report); JA130 (Pls.' Ex. C, Scanlan Depo. 46:15-47:12); JA68, 71-72 (Pls.' Ex. A, Gardner Depo. 92:12-20; 104:20-105:3); see also State's Br. at 30 (addressing interest in "preventing voter intimidation and election fraud").

This interest is, at most, only "compelling in the abstract." ADD65. As the District Court correctly held, the State has not met the required "compelling" threshold because it has failed to produce any evidence of "an actual or imminent problem with images of completed ballots being used to facilitate either vote

buying or voter coercion." Id. at 66. Instead, the State has produced only "anecdote and speculation." Id. at 68. The State, as it must, concedes that (i) "there appears to be no documented cases of vote buying within" New Hampshire and (ii) there is a "lack of evidence that images of completed ballots are being used to facilitate vote buying and voter coercion schemes" in the state (or anywhere for that matter). See State's Br. at 8, 12, 27. The only modern-day incidents of vote buying presented by the State did not occur in New Hampshire (or within the First Circuit) and did not "involve[] the use of a digital or photographic image of a marked ballot." ADD49; see also State's Br. at 8-10 (citing cases, but acknowledging that "there is no evidence that digital photography played a role in any of the examples"). Despite the fact that small cameras have been in use for at least 15 years, see ADD67, the State has even acknowledged that it has never received a complaint or concern regarding a voter displaying or publishing a photograph of his or her marked ballot (online or otherwise) to a party buying or coercing a vote since 1976. See JA102-03, 151-52 (Pls.' Exs. B and D, State's Int. Resp. Nos. 18, 20; Gardner Ex. 1; Scanlan Ex. 2); JA124 (Pls.' Ex. C, Scanlan Depo. 23:11-22); JA57 (Pls.' Ex. A, Gardner Depo. 46:10-14; 48:6-13). This is the case despite the fact that over 4,400,000 votes have been cast in New Hampshire general elections since 2000.

The State's reliance on Burson v. Freeman, 504 U.S. 191 (1992) in arguing

that HB366 serves a compelling governmental interest is misplaced. See State's Br. at 30, 32. As the District Court correctly explained, unlike the electioneering buffer zone around polling places upheld in Burson because it was indicative of the government's "long, uninterrupted and prevalent" use of similar statutes regulating the polling place, HB366 "is quite new and cannot be tied to historical evidence of recent voter fraud." ADD69. Plaintiffs do not dispute that states have historically prohibited vote bribery and voter coercion in an effort to ensure that individuals are allowed to keep their votes secret and are not compelled to involuntarily disclose their marked ballots to others. But HB366's explicit regulation of one's ability to voluntary publish online a photograph of a marked ballot as a form of political speech far outside the polling place (including from the privacy of one's own home) after an election is entirely novel.

Indeed, HB366 is the first state law in the country to explicitly and intentionally ban all such online political messages made outside the polling place at any time. Before the smartphone era, many states—including New Hampshire (before HB366), Pennsylvania, and Vermont—did not expressly prohibit individuals from taking photographs of their marked ballots in the polling place and then showing those photographs to others outside the polling place after they had voted; instead, these states only prohibited the display in the polling place

before one was "about to vote" by placing the ballot in the ballot box.[5] Today, several states (Maine, Oregon, Utah, and Arizona) expressly allow for the display of photographs of marked ballots outside the polling place in recognition of digital technology and the importance of political speech on social media platforms. See JA166-67 (Pls.' Ex. E, 50-State Survey, as of March 2015).[6]

Accordingly, because the State concedes that its asserted interest is

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[5] The State repeatedly acknowledges that HB366 represents a change in the law, as the prior version of RSA 659:35(I), which was in place for over a century, only "regulated conduct up to the point the voter placed his or her ballot in the ballot box." See State's Br. at 3, 6, 29.

[6] See JA166-67 (Pls.' Ex. E, 50-State Survey, as of March 2015). Since 2011, Maine, Oregon, Utah, and Arizona have allowed the display of a marked ballot. See Me. Rev. Stat. Ann. tit. 21-A, § 674(1)(D) (effective 2011, repealing section that prohibited the showing of a "marked ballot to another with the intent to reveal how that person voted"); http://law.justia.com/codes/maine/2005/title21-ach0sec0/title21-asec674.html (showing prior version of Maine law); S.B. 1504, 77th Or. Leg. Assem., Reg. Sess. (Or. 2014) (enacted) (effective Jan. 1, 2015, repealing language in prior Or. Rev. Stat. § 260.695(7) stating that "[a] person may not show the person's own marked ballot to another person to reveal how it was marked"), available at https://olis.leg.state.or.us/liz/2014R1/Downloads/MeasureDocument/SB1504/Enrolled; H.B. 72, Gen. Sess. (Utah 2015) (enacted) (effective May 12, 2015, amending Utah Code Ann. § 20A-3-504 to make clear in subsection (3) that language in subsection (1) "does not prohibit an individual from transferring a photograph of the individual's own ballot in a manner that allows the photograph to be viewed by the individual or another"), available at http://le.utah.gov/~2015/bills/static/HB0072.html; S.B. 1287, 52nd Leg., 1st Reg. Sess. (Ariz. 2015) (enacted) (effective July 3, 2015, adding language to Ariz. Rev. Stat. Ann. § 16-1018(4) stating that "[a] voter who makes available an image of the voter's own ballot by posting on the internet or in some other electronic medium is deemed to have consented to retransmittal of that image and that retransmittal does not constitute a violation of this section"), available at https://legiscan.com/AZ/text/SB1287/2015.

hypothetical and not motivated by any evidence, it has failed to reach the "compelling" threshold required under the strict scrutiny standard.

C. HB366 Is Not Narrowly Tailored.

HB366 also cannot be viewed as narrowly tailored because it indiscriminately bans all speech using a photograph of marked ballot, including innocent political speech wholly unrelated to vote buying and voter coercion. See Cutting v. City of Portland, 802 F.3d 79, 81, 88 (1st Cir. 2015) ("We conclude that the ordinance [banning people from medians violates the constitutional guarantee of freedom of speech], because it indiscriminately bans virtually all expressive activity in all of the City's median strips and thus is not narrowly tailored to serve the City's interest in protecting public safety."); see also Reno v. ACLU, 521 U.S. 844, 880 (1997) (Communications Decency Act of 1996 was overbroad because it "suppress[ed] a large amount of speech that adults have a constitutional right to send and receive"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 350 (1995) (ban on dissemination of anonymous campaign literature not narrowly tailored to interests of deterring fraud and libel because "the prohibition encompasses documents that are not even arguably false or misleading"); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 121, 123 (1991) (law requiring an accused or convicted criminal's income from works describing his crime be given to the victim and

creditors was a "significantly overinclusive," and therefore not tailored); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); Stevens, 559 U.S. at 475 (federal criminal statute's ban on "depictions of animal cruelty" was overbroad because "[a] depiction of entirely lawful conduct runs afoul of the ban"). As the District Court succinctly explained, HB366 is "vastly overinclusive" and not narrowly tailored because it primarily "punish[es] only the innocent" who "wish to use images of their completed ballots to make a political point." See ADD72-73.

It is worth noting that HB366's intrusion on innocent political speech is not incidental. It was deliberate on the part of the Secretary of State and the legislature. See Reed, 135 S. Ct. at 2227 (independent from whether a law is content based on its face, a law is also content based if it was adopted "because of disagreement with the message [the speech] conveys") (quoting Ward, 491 U.S. at 791). As the Secretary of State testified at deposition:

> Q. So it's your testimony in your role as secretary of state that it should be illegal for an individual of their own accord to publish their own ballot through social media in order to advocate their political views?
> A. Yes.
> Q. All right. And should it be illegal under the law of the state of New Hampshire for someone of their own accord to publish their ballot online in order to advocate a political position?
> A. Yeah. I don't—I mean, I told you what Hitler did, so...

> Q. We'll get to Hitler in a second, but—
> A. It's—the answer is—the answer is yes
> ….
> Q. … Is it your testimony, I think it is, but I want to make sure, that an individual like my grandmother who because she wants people to know who she voted for or wants other people to vote for that same person publishes her ballot through social media, that she should be prosecuted for a violation-level offense in the state of New Hampshire?
> A. Yes.
> ….
> Q. And your answer about my grandmother should be prosecuted for a violation-level offense for publishing her ballot because she wants people to know who she voted for is the same even in instances where there's no allegation of vote bribery relating to her conduct?
> A. Yes.
> Q. And even—your answer is the same even when there's no allegation of coercion involved in her conduct?
> A. Yes.

JA52, 60, 61 (Pls.' Ex. A, Gardner Depo. 27:3-16; 59:15-22; 61:3-13); see also JA125, 127 (Pls.' Ex. C, Scanlan Depo. 26:14-27:1; 28:10-20; 34:6-36:4) (acknowledging that the challenged law bans innocent, political speech); JA74, 76-77 (Pls.' Ex. A, Gardner Depo. 113:23-115:5; 122:7-123:9; 125:15-127:14) (same).

These innocent, political messages are specifically disfavored because the Secretary of State's Office has a fear—albeit a speculative one not borne by any evidence—that such innocent messages could "allow [fraudulent] scenarios or activities to occur." JA124-25, 127-29, 132 (Pls.' Ex. C, Scanlan Depo. 22:23-23:10; 26:14-27:1; 28:10-20; 34:6-36:4; 37:21-38:11; 41:11-16; 53:7-20). The Secretary of State even testified that he thought the innocent, political display of a

marked ballot should be a misdemeanor offense, rather than a violation. JA50 (Pls.' Ex. A, Gardner Depo. 17:3-11). It is worth noting, however, that a photographic image of a ballot is, of course, different than the ballot itself. While the government gets to possess the ballot after it is cast, it is the speaker, not the government, who owns this photograph of the marked ballot that he or she has taken. See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (originator of a photograph may claim copyright in his/her work); 17 U.S.C. §§ 101, 201 (permitting copyright of "pictorial, graphic, and sculptural works").

The New Hampshire legislature similarly intended to ban innocent, political speech when it enacted the challenged law. During the March 8, 2014 public hearing on HB366 before the House Criminal Justice and Public Safety Committee, the American Civil Liberties Union of New Hampshire testified that the bill "would sweep in a wide array of innocent speech by those who did not sell their votes." JA219-41 (Pls.' Ex. G, HB366 Legislative History at 90-112 (104-05), March 6 and 18, 2014 House Criminal Justice Committee Materials on HB366). However, the Committee, like the House Election Law Committee before it, approved the bill.

Indeed, on March 18, 2014, this House Committee specifically rejected by a vote of 5 to 10 a proposed amendment that would have ensured that HB366 did not sweep within its scope innocent, political speech. Under this amendment,

HB366's prohibitions would apply "only if the distribution or sharing is for the purpose of receiving pecuniary benefit, as defined in RSA 640:2, II(c), or avoiding harm, as defined in RSA 640:3." JA219-20, 222, 226-27 (id. at 90-91, 93, 97-98). And when the final version of HB366 was recommended "ought to pass" by a majority of the House Criminal Justice and Public Safety Committee, the six Committee members in the minority prepared a "minority committee report" explaining how the bill was "overly broad" because it would ban innocent, political speech. See JA211-18 (Pls.' Ex. G, HB366 Legislative History at 82-89, March 19, 2014 Minority Report).

The United States Supreme Court's recent analysis in McCullen v. Coakley, 134 S. Ct. 2518 (2014), of whether Massachusetts' 35-foot reproductive health care facility buffer zone was narrowly tailored is instructive when analyzing HB366's prohibition on innocent speech unrelated to vote buying and voter coercion. There, the Court first observed that the buffer zone had reduced petitioners' opportunities to effectively and peacefully speak with their intended audience through face-to-face communications—speech that, by virtue of its peacefulness, was untethered to the public safety interests raised by Massachusetts. 134 S. Ct. at 2535. The Court then explained that Massachusetts had ample alternatives that would more directly address its public safety interests without substantially burdening this speech, including greater enforcement of

"criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." Id. at 2538. However, the law was not narrowly tailored because Massachusetts "ha[d] not shown that it seriously undertook to address the problem with [these] less intrusive tools readily available to it." Id. at 2539 (emphasis added). The Court concluded: "The point is … that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." Id.

This Court applied this same analysis in striking down a content-neutral median ban in Portland, Maine. See Cutting, 802 F.3d at 91. There, this Court recognized that a blanket median ban swept within its scope innocent, peaceful speech that had nothing to do with the City's interests in protecting drivers and pedestrians. Id. at 90. Highlighting the ordinance's dramatic overbreadth, this Court explained: "Absent evidence about whether the City's other median strips present the same or a similar danger, we have no basis for concluding that a substantial number of them do. The ordinance is thus geographically over-inclusive with respect to the City's concern that people lingering in all of the City's median strips—no matter which ones—pose a danger to those passing by." Id. at 89-90. This Court felt that more narrowly tailored approaches were obvious, citing the following examples: "The City might … have considered an ordinance

that focused more directly on the dangerous activities that were the source of initial concern, such as ordinances directed at public intoxication or belligerent behavior. Or it might have considered limiting activity on medians only at night, when the dark makes it more difficult for drivers to see, or during hazardous weather conditions, when slick roads increase the chances that a car will skid into a median." Id. at 92. However, like Massachusetts in McCullen, "the City did not try—or adequately explain why it did not try [these or other] less speech restrictive means of addressing the safety concerns it identified." Id. at 91 (citing McCullen, 134 S. Ct. at 2540). For these reasons, this Court concluded that the blanket median ban was "so sweeping that it does ban substantially more speech than necessary to serve the City's interest in preventing people on medians from being hit by drivers." Id. at 92.

Here, as it was in McCullen and Cutting, there are obvious more narrowly tailored approaches. At the outset, the State could at least attempt to use existing laws that criminalize the vote corruption behavior that the State is seeking to prevent. As the District Court correctly noted, existing state and federal laws already criminalize vote buying and voter coercion without banning innocent speech. 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). RSA 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."); RSA 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 RSA 659:37 (voter interference prohibited); RSA 659:39 (giving liquor to voter to influence an election prohibited); RSA 659:40(III) (voter suppression prohibited); ADD49-50. Of course, if a person publicly posts a picture of a marked ballot on the Internet showing how he or she voted (including in a situation where there was additional evidence of illegal activity), the State could easily identify and investigate the voter for a potential violation of these existing laws. And if the State wishes to further regulate this area, another more tailored approach would be to enact a targeted law that—as five members of the House Criminal Justice Committee and the District Court recommended—bans the photographic display of a marked ballot as part of a vote buying or voter coercion scheme. See ADD73-74.

Tellingly, throughout this litigation, the State has barely addressed these more narrowly tailored approaches, let alone presented evidence that they would be insufficient to address its concerns. Put simply, the State has failed to show

"that it seriously undertook to address the problem with less intrusive tools readily available to it" and that "alternative measures that burden substantially less speech would fail to achieve the government's interests." McCullen, 134 S. Ct. at 2539, 2540; see also Reno, 521 U.S. at 879 ("Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all."); Ashcroft v. ACLU, 542 U.S. 656, 668 (2004) ("Whatever the deficiencies of filters, however, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA."). This is ultimately fatal to HB366 under McCullen and Cutting.

For example, the Secretary of State's Office testified in interrogatory responses and at deposition that, prior to proposing HB366, it conducted no studies concerning (i) whether RSA 659:40 is "insufficient to address vote buying and/or voter coercion in New Hampshire," (ii) whether the innocent display of marked ballots as a form of political speech would cause vote corruption to become more prevalent in New Hampshire, or (iii) whether those who had engaged in the online posting of marked ballots were actually engaging in vote corruption. JA101-02, 150-51 (Pls.' Exs. B and D, State's Int. Resp. Nos. 14; Gardner Ex. 1; Scanlan Ex. 2); JA124-25, 129 (Pls.' Ex. C, Scanlan Depo. 24:14-

26:13; 41:17-21; 42:4-8); JA75 (Pls.' Ex. A, Gardner Depo. 118:15-120:14). To the contrary, the record demonstrates that the legislature, with little analysis, expressly rejected less intrusive means that would have addressed the State's interests without also banning innocent, political speech. See JA219-20, 222, 226-27 (Pls.' Ex. G, HB366 Legislative History at 90-91, 93, 97-98) (rejecting amendment narrowing bill to, in part, vote buying circumstances). Nor has the State identified a single voter negatively impacted by another voter's innocent, political display of a marked ballot. JA78 (Pls.' Ex. A, Gardner Depo. 132:13-16). As McCullen and Cutting make clear, the State is not permitted to shoot first and aim later when it comes to laws restricting speech.

The State argues that HB366 is a tailored speech restriction governing "the area around the voter" in the same vein as the regulation sustained in Burson v. Freeman, 504 U.S. 191 (1992). See State's Br. at 30-32. But Burson actually supports Plaintiffs' position. There, a 100-foot electioneering buffer zone on Election Day survived strict scrutiny, but only because "an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places." Id. at 200 (emphasis added). In essence, Burson demonstrates that the State's governmental interests in regulating speech concerning elections diminish considerably when that speech is not "in or around a polling place." Unlike the regulation in Burson, HB366

broadened existing law to regulate speech far beyond the polling place after the voter has placed his or her ballot in the ballot box. This is undisputed. See also State's Br. at 3, 6, 29.

Indeed, the legislative history of HB366 makes clear that the legislature knew that its terms would change and expand then-existing law—which only impacted speech prior to the act of physically casting a ballot within a polling place—by now regulating speech occurring after one had voted, including speech occurring outside the polling place. JA108-115 (Pls.' Ex. B, Apr. 9, 2014 Senate Public and Municipal Affairs Hearing Report, Gardner Ex. 3) (Deputy Secretary of State Scanlan testifying that the law pre-HB366 states that a "person cannot show their marked ballot prior to casting it" and that HB366 would extend beyond Election Day); Pls.' Ex. H (Recording of Apr. 9, 2014 Senate Public and Municipal Affairs Hearing) (20:30-22:20); JA62, 64, 69 (Pls.' Ex. A, Gardner Depo. 67:20-68:20; 73:1-7; 76:5-11; 94:16-19). As the District Court aptly noted, HB366 bans photographic disclosures that "will generally take place far away from a polling place." ADD63. In fact, all the plaintiffs in this case uploaded photographs of their marked ballot after they had left the polling place. AVC ¶¶ 31, 35, 40.

The challenged law also, unlike the speech restriction in Burson, indefinitely bans the posting of one's ballot on the Internet, including postings

made in one's own home months or even years after Election Day. JA125 (Pls.' Ex. C, Scanlan Depo. 28:11-20) (acknowledging lack of time limitation); see also City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (noting "[a] special respect for individual liberty in the home"). This too is undisputed, yet ignored by the State. In Plaintiff Brandon D. Ross's case, he published his ballot on social media 10 days after the primary election. AVC ¶ 40. Any concerns the State may have about voter coercion on Election Day are only relevant while the voting process is in progress, not weeks, months, or even years after the election. In fact, RSA 659:35(I) contained such a temporal restriction before it was amended by HB366, as it initially only limited the display of a marked ballot indicating how one is "about to vote." Thus, the prior version of the law was effectively circumscribed to the disclosure of one's ballot on Election Day. See JA123-24 (Pls.' Ex. C, Scanlan Depo. 20:2-22:1) (testifying that prior law "stopped at the point of dropping [the ballot] in the ballot box").

Of course, simply because the challenged law implicates elections and perceived voter corruption does not immunize it from the normal, but rigorous, requirement that it be narrowly tailored given its impact on innocent political speech. Multiple courts since Burson have applied strict scrutiny to reject laws implicating elections that sweep within their scope innocent, political, and non-disruptive speech. For example, in State v. Brookins, 844 A. 2d 1162 (Md. 2004),

the Maryland Supreme Court struck down a state law that prohibited candidates and others from paying persons for performing "walk around services" (such as distributing sample ballots) on election days. The law was enacted to prevent election corruption. There, the Court applied strict scrutiny and concluded that the law failed on narrow tailoring grounds:

> [T]he State's purported interest in corruption or apparent corruption of the electoral process by prohibiting vote-buying, endorsement buying or their appearance already is sufficiently covered by existing statutes. Therefore, regarding the State's interest in preventing actual vote-buying … is superfluous and redundant and, thus, is not the least restrictive measure for achieving that goal …. [Voter fraud and corruption] … does not give the State the right to abridge speech because it paternalistically seeks to establish a completely fraud-free atmosphere within which the electorate is exposed only to the absolute untainted truth about political candidates or their platforms."

Id. at 1179, 1181 (emphasis added).

Similarly, in CBS Broad., Inc. v. Cobb, 470 F. Supp. 2d 1365 (S.D. Fla. 2006), the Court, as applied to exit-polling activities, struck down a Florida law that prohibited, among other things, the conducting of voter polling inside a polling place or within 100 feet of the entrance to any polling place. There, the Court held that the Florida Secretary of State "failed to provide any meaningful evidence that exit polling has any history of leading to voter intimidation, impeding voter access to the polls, or encouraging election fraud." Id. at 1371. The Court found particularly problematic the fact that the State sought to ban "all exit polling and reporters' interviews without any regard as to whether they are

disruptive." Id. As a result, because "the statute so broadly restricts expressive activity," the Court concluded that its application to exit-polling activities was unconstitutional. Id. at 1371-72. This same analysis applies here. As in Brookins and CBS, (i) HB366 governs innocent speech outside the polling place that does not disrupt the act of voting, (ii) existing laws already address vote buying and voter coercion, and (iii) the State has failed to present any evidence that the innocent, political display of a marked ballot will cause others to engage in voter corruption.

HB366 also cannot possibly serve the purpose of protecting the victims of voter coercion because the statute actually penalizes the victimized voter who is alleged to have displayed his or her ballot to the coercing party, not the party who actually engaged in the illegal activity that the law is aimed at addressing. This too is undisputed. As Deputy Secretary Scanlan testified at deposition:

> Q. …. [RSA] 659:35 can be used to prosecute the—in my fact pattern the victims of vote bribery, voter coercion, voter intimidation?
> A. It could be used to prosecute those individuals that choose to show their ballot for whatever reason, yes.
> Q. Even if they're intimidated or coerced by their political or employment boss to do so?
> A. If they show their ballot, yes.

JA130, 129 (Pls.' Ex. C, Scanlan Depo. 45:13-21; 42:9-43:17); see also JA74 (Pls.' Ex. A, Gardner Depo. 113:12-16). If the goal is truly to prevent voter corruption and protect the victims of these unlawful acts, it makes little sense to

punish the victim. Rather, the more tailored approach to addressing this interest would be to prosecute the actual perpetrators of vote buying and voter coercion to ensure that victims are made safe from these unlawful practices.

The State also incorrectly relies on McCullen to suggest that the government has greater latitude to restrict the online speech at issue here because, unlike the sidewalk speech at issue in McCullen, the online display of a marked ballot is not "historically associated with the communication" of how one voted. See State's Br. at 32. The First Amendment imposes no such litmus test. To only provide robust First Amendment protections in places that are "historically associated with communication" (i.e., sidewalks, parks, etc.) would undermine free speech using new technological fora simply by virtue of the fact that these technologies are new. It goes without saying that the Internet—though a relatively recent phenomenon—has become a central (and for some, the only) means of communicating political ideas with others. Courts have repeatedly recognized the importance of the Internet and have explained that online speech should be given the same constitutional protections that apply to speech in public fora like parks and sidewalks. See, e.g., Reno, 521 U.S. at 870; Doe v. Harris, 772 F.3d 563, 574 (9th Cir. 2014) ("…. [O]nline speech stands on the same footing as other speech—there is no basis for qualifying the level of First Amendment scrutiny that should be applied to online speech."). The First Circuit has similarly

stressed the importance of the Internet in modern life.[7]

This Court need not be concerned with the State's suggestion that, without HB366, it will be more difficult to, given the prevalence of smartphones, "thwart[] 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." See State's Br. at 4, 10. This is true for at least three reasons. First, as explained above in Part IV(B) supra, there is absolutely no evidence in the record suggesting that HB366 will actually keep the "genie in the bottle" by reducing the likelihood of vote buying or voter coercion occurring in New Hampshire. JA124, 128-29 (Pls.' Ex. C, Scanlan Depo. 22:23-23:10; 37:21-38:11; 41:11-16). The State's hypothetical and speculative parade of horribles that, without HB366, the "genie" of fraudulent activity that occurred in the late 1800s *could* be let "out of the bottle" is not enough, as a matter of law, to suppress innocent political speech. See Brookins, 844 A. 2d at 1180 ("This Court is not willing to uphold a statute that restricts core political speech on the basis of such a speculative and unlikely, in any event,

[7] See, e.g., United States v. Perazza-Mercado, 553 F.3d 65, 72 (1st Cir. 2009) ("An undue restriction on internet use renders modern life—in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website—exceptionally difficult.") (quoting United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003)); United States v. Ramos, 763 F.3d 45, 60 (1st Cir. 2014) ("There is ample reason to believe that it will become harder and harder in the future for an offender to rebuild his life when disconnected from the internet at home.").

hypothesis."); see also JA124 (Pls.' Ex. C, Scanlan Depo. 22:23-23:10). Nor can this Court simply "defer to the [legislative or bureaucratic] judgment that nothing less than a total ban [on photographic displays of marked ballots] would be effective in preventing" vote buying and voter coercion, especially when it undertook no detailed findings or studies on the subject. See Reno, 521 U.S. at 875. There is simply no evidence to support the State's apocalyptic and speculative belief that, without HB366, New Hampshire will devolve into totalitarianism[8]—a belief that is contradicted by the fact that, until HB366, New Hampshire permitted the publication of "ballot selfies" without a single

[8] According to Secretary of State William Gardner, HB366 was necessary to stop the establishment of oppressive voting practices that existed under Adolf Hitler in the 1930s, Joseph Stalin in Soviet-occupied Poland, and Saddam Hussein in Iraq prior to 2003. JA50-52 (Pls.' Ex. A, Gardner Depo. 18:13-25:14). Surprisingly, the State's brief relies on these hyperbolic and apocalyptic comparisons despite their obvious inapplicability. See State's Br. at 7. First, setting aside the fact that Secretary Gardner is obviously not qualified to testify on German, Russian, or Iraqi history, these apocalyptic conclusions are speculative and unsupported by any evidence. See United States v. Virginia, 518 U.S. 515, 533 (1996) (under heightened scrutiny, the government's "justification must be genuine, not hypothesized or invented post hoc in response to litigation."). Second, HB366 bans voluntary disclosure of a photograph of a marked ballot as a form of political speech. Even if HB366 is struck down, nothing in New Hampshire law would compel a voter to disclose his or her marked ballot. To the contrary, unlike a totalitarian regime, coercing such involuntary disclosure would be unlawful under existing New Hampshire law. Third, HB366 also was not in effect during the February 9, 2016 New Hampshire primary due to the District Court's order. During that election, approximately 532,069 votes were cast—a new primary record. There is no indication from this election that there was a problem with "ballot selfies" or that New Hampshire is headed down the path of totalitarianism. Fortunately, unlike totalitarian regimes, New Hampshire and the United States also have free speech protections.

documented incident of such photographs being used to facilitate a vote buying or voter coercion interaction. In short, this Court need not worry that striking down HB366 is tantamount to "throwing away your umbrella in a rainstorm because you are not getting wet." Here, there is no evidence of a "rainstorm" at all.

Second, HB366's ban of the photographic display of a marked ballot on social media will do little, if anything, to address vote buying or voter coercion. As the District Court correctly acknowledged, "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." ADD69-70. This is because "people engaged in vote buying and voter coercion will not publicly broadcast their actions via social media." Id. at 74. Thus, as the District Court held, HB366 is far more likely to ensnare "those who wish to use images of their completed ballots to make a political point." Id. at 73.

Third and finally, even if it could be assumed that HB366 would, from time to time, deter an instance of vote buying or voter coercion—again, an assumption which is unsupported—this would not justify the law's intrusion on protected speech. See Broadrick, 413 U.S. at 612 ("[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted …."); see also Free

Speech Coalition, 535 U.S. at 255 ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."). The First Amendment does not permit the State to "sacrifice speech for efficiency." See Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795 (1988). As the United States Supreme Court recently made clear in McCullen, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." McCullen, 134 S. Ct. at 2540 (emphasis added); see also Cutting, 802 F.3d at 92 ("Such a [blanket median] ban is obviously more efficient, but efficiency is not always a sufficient justification for the most restrictive option."). In McCullen, surely a 35-foot buffer zone would have prevented the unlawful act of blocking clinic access, but this perceived efficiency could not justify the law's intrusions on innocent, protected speech. Here, the challenged law is no different.

Accordingly, HB366's amendment to RSA 659:35(I) is not tailored and cannot survive strict scrutiny.

D. Even If HB366 Is Content-Neutral (Which It Is Not), It Fails Intermediate Scrutiny.

Even if this Court concludes that HB366 is a content neutral restriction on speech and therefore applies intermediate scrutiny, the law would fail this level of

review. The District Court suggested that it agreed with this conclusion. ADD75-76 ("…. 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."). Under this degree of scrutiny, the law must be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. See McCullen, 134 S. Ct. at 2529; Cutting, 802 F.3d at 84.

As explained above in Part IV(C) supra, like the content-neutral buffer zone in McCullen and the content-neutral median ban in Cutting, the State cannot meet its burden to show that HB366 is a narrowly-tailored means of addressing the State's interest in combatting vote buying and voter coercion.[9]

HB366 also fails under intermediate scrutiny because it does not provide alternative channels of communication, despite the State's position that the law allows a voter to verbally or in writing disclose for whom they vote.[10] This is true

[9] The District Court correctly applied strict scrutiny in striking down HB366's amendment to RSA 659:35(I). However, if this Court concludes that intermediate scrutiny applies, it should apply the intermediate scrutiny analysis and strike down HB366 rather than remand to the District Court. The record is more than sufficient for this Court to apply intermediate scrutiny, and no party would be prejudiced in the absence of a remand, especially where (i) both parties have already argued how this case should be resolved if intermediate scrutiny applies and (ii) the District Court suggested that HB366 should be struck down if a lesser degree of scrutiny applies. See Cutting, 802 F.3d at 86; ADD75-76.

[10] Even if the Court subjects HB366 to intermediate scrutiny as a content-neutral speech restriction, it need not address whether alternative channels exist if the Court concludes that the law is not narrowly tailored. See Cutting, 802 F.3d at 79, 92 n.15; McCullen, 134 S. Ct. at 2540 n.9.

for two reasons. First, as the United States Supreme Court explained in Reno v. ACLU, 521 U.S. 844 (1997), the State's position "is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafletting on the streets *regardless of their content*—[the Supreme Court has] explained that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" Id. at 880 (quoting Schneider v. State, 308 U.S. 147, 163 (1939)) (emphasis added). Second, HB366 constitutes an absolute prohibition on political speech using the powerful imagery of a marked ballot. Here, Plaintiffs have made clear that they "wish to continue engaging in this form of political speech that is prohibited by [HB366]" and that the messages they want to convey "lose their power without the photograph of the marked ballot." AVC ¶¶ 42, 3, 6. Recognizing this, the District Court accurately held that HB366 "deprives voters of one of their most powerful means of letting the world know how they voted." ADD60.[11]

[11] It should also go without saying that the use of visual imagery to convey a message is entitled to the same protections that are accorded all other forms of communication, including verbal communication, printed words, and publications by the press. See Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression …. [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse

Accordingly, HB366 also fails intermediate scrutiny.

V. CONCLUSION

HB366 fails to realize the critical importance of online political speech under the First Amendment as well as to American culture. For many people throughout New Hampshire—indeed, the United States—smart phones, the Internet, and social media platforms have become the predominant means for communication and public discourse. When the Internet was in its infancy, the United States Supreme explained: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." Reno, 521 U.S. at 870; see also Clement v. Cal. Dep't of Corrs., 364 F.3d 1148, 1152 (9th Cir. 2004) (The First Amendment "protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era").

The ideas, opinions, emotions, actions, and desires capable of communication through the Internet are limited only by the human capacity for

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of Lewis Carroll.") (citation omitted); Kaplan v. California, 413 U.S. 115, 119-120 (1973) (explaining that photographs, like printed materials, are protected by the First Amendment); ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."); Stevens, 559 U.S. at 468 (First Amendment applies to "visual [and] auditory depiction[s]").

expression. With the advent of smartphones, this reality is even more pronounced. As of 2015, nearly two-thirds (64%) of American adults own a smartphone, and three-quarters of smartphone owners report using their phone for social media.[12] If First Amendment protections are to enjoy enduring relevance in the twenty-first century, they must apply with full force to speech conducted online and through social media platforms using smartphones, especially where this speech is political in nature. Because a substantial number of HB366's applications are unconstitutional, HB366 is vastly overinclusive, overbroad, and not narrowly tailored. HB366 must be struck down on its face.

Accordingly, the judgment of the District Court should be affirmed, judgment should be entered on behalf of Plaintiffs, and this Court should declare HB366's amendment to RSA 659:35(I) as violative of the First and Fourteenth Amendments to the United States Constitution.

[12] Pew Research Center, "6 Facts About Americans and their Smartphones," Apr. 1, 2015, available at http://www.pewresearch.org/fact-tank/2015/04/01/6-facts-about-americans-and-their-smartphones/.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Leon H. Rideout et al. complies with the type 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 of Leon H. Rideout et al. consists of 13,769 words.

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