UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

LEON H. RIDEOUT, ANDREW LANGLOIS, and BRANDON D. ROSS, Plaintiffs, v. WILLIAM M. GARDNER, Secretary of State of the State of New Hampshire, in his official capacity, Defendant	)	Civil Case. No. 1:14-cv-00489-PB

PLAINTIFFS' CONSOLIDATED (I) OBJECTION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND (II) REPLY TO DEFENDANT'S OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs do not argue that the government lacks a legitimate interest in addressing vote buying or voter coercion, nor do Plaintiffs dispute that incidents of vote buying and voter coercion have occurred in the United States. Of course, vote buying and voter coercion can be (and are) criminalized. *See* RSA 659:40(I-II). But this case is about a law adopted by the State that is simply not narrowly targeted at such illegal conduct. As the State's brief acknowledges, RSA 659:35(I) on its face prohibits a wide swathe of innocent, political speech that has nothing to do with vote buying or voter coercion. The Attorney General's Office has even made clear that it will prosecute individuals under RSA 659:35(I) for engaging in this innocent form of expression. The State has no real interest in or need to proscribe such speech.

The State's brief is telling for its concessions. For example, the State concedes that "there appears to be no documented cases of vote buying within" New Hampshire. *See* State's Memo. at 5 (Doc. No. 22-1). Even in the vote buying examples the State cites from other jurisdictions, the

State acknowledges that "there is no evidence that digital photography played a role in any of the examples." *See id.* at 7. Given the lack of evidence of vote buying in New Hampshire—let alone vote buying that is consummated through the display of a marked ballot—RSA 659:35(I) is far more likely to impact innocent speech than illegal conduct. The State also does not dispute that it has failed to attempt to address the issue of vote buying and voter coercion through less intrusive means. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2539-40 (2014). 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* Biss. Aff. ¶ 8, *Ex. G* (HB 366 Legislative History at 90-91, 93, 97-98). The State also concedes that the law bans speech outside the polling place with no time limitation beyond the day of the election. And, to make matters worse, the State does not dispute the fact that RSA 659:35(I) actually penalizes the victimized voter who displays his or her marked ballot to the buying/coercing party, not the culpable party who initiated the very illegal activity that the law is purportedly aimed at addressing. Simply put, nothing in the State's brief comes close to the showing required by U.S. Supreme Court precedent before a government may ban innocent online speech. Thus, RSA 659:35(I) is not narrowly tailored and should be permanently enjoined.

I. Strict Scrutiny Applies.

Strict scrutiny applies for two separate and independent reasons. *First*, RSA 659:35(I) is content based because it prohibits the revelation of specific content and requires government actors to examine the content of a message displayed on a ballot. As the U.S. Supreme Court explained in *McCullen*, 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." *McCullen*, 134 S. Ct. at 2531. The State does not appear to dispute the fact that, in examining whether RSA 659:35(I) has been violated, a law enforcement officer must ascertain whether a

message conveyed through the display of a ballot contains (i) a ***mark*** voting for a political candidate (thus rendering the speech unlawful) or (ii) speech using a ballot that was ***not marked*** for a political candidate (thus rendering the speech lawful).

The State is correct that a violation of RSA 659:35(I) does not depend on who the voter votes for. *See* State's Memo. at 9. But this 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 a message is being conveyed through a ballot that is "***marked***" for a candidate. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992) (buffer zone banning the display or distribution of political campaign materials was content based even where violation did not depend on the type of political speech engaged in).[1]

The State's reliance on *Hill v. Colorado*, 530 U.S. 703 (2000) is also misplaced. In *Hill*, the U.S. 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

[1] It is also incorrect for the State to contend that RSA 659:35(I) is content neutral on the grounds that it "does not concern the mere offense of discomfort of others who see a 'ballot selfie.'" *See* State's Memo. at 12. The Secretary of State's Office made clear at deposition that it was concerned with the purportedly undesirable effects that arise from the direct impact of this form of speech on its audience—a motivation that plainly makes the law content based under *McCullen*. *See McCullen*, 134 S. Ct. at 2531 (law is content based "if it [is] concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech"). For example, the Secretary of State's Office testified repeatedly about its (speculative) fear that even innocent messages using the display of marked ballots would have an undesirable impact on recipients by creating a culture where individuals may feel free to display photographs of their marked ballots to others, thus "allow[ing] [fraudulent] scenarios or activities [like vote buying and voter coercion] to occur." *See* Biss. Aff. ¶ 4, *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).

reproductive health care facilities: 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. In contrast, RSA 659:35(I) targets 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 ***marked*** ballot. Unlike the circumscribed buffer zones in *Hill* and *McCullen* where the contours of the message itself were irrelevant, the only way to determine whether a message is proscribed under RSA 659:35(I) is to examine the message itself. Thus, RSA 659:35(I) is content based.

Second, strict scrutiny applies for the independent reason that the law forbids "the dissemination of truthful and lawfully obtained information on a matter of public concern." *See Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989). The State attempts to avoid *Florida Star* by contending that New Hampshire law does not support the notion that "how a voter specifically votes is a matter of public concern." *See* State's Memo. at 20. This argument fails because it ignores the reality that the voluntary display of one's marked ballot is not just a vehicle to show the identity of the candidate for whom the person has voted; rather, it is a vehicle to discuss political ideas and one's experience at the polls generally. For example, it can communicate (i) a message of protest against the very law that bans such a message (e.g., Plaintiff Brandon Ross), (ii) a message of excitement for having voted for a particular candidate (e.g., Plaintiffs Leon Rideout and Brandon Ross), (iii) a message of disgust for one's choices of candidates (e.g., Plaintiff Andrew Langlois), (iv) a message of pride in one's own political candidacy (e.g., Plaintiffs Leon Rideout and Brandon Ross), and (v) a message encouraging others to vote in an election (e.g., Plaintiff Leon Rideout). *See* Supp. Biss. Aff. ¶ 1, *Ex. Y* (Displayed Marked Ballots During 2014 General Election). It cannot seriously be disputed that these political messages—

each of which go far beyond simply communicating how one has voted—implicate matters of public concern. Accordingly, strict scrutiny applies under *Florida Star*.

II. RSA 659:35(I) Is Not Narrowly Tailored Under Any Form Of Scrutiny

While the question of whether RSA 659:35(I) is content based or content neutral is important, it is not a question that this Court must dwell on because, under any standard of review (whether it be strict scrutiny or intermediate scrutiny), the law is not a narrowly tailored means of addressing vote buying and voter coercion.

In the face of the obvious burdens RSA 659:35(I) imposes on free speech, the State only addresses narrow tailoring in less than two (2) pages of its brief. These two (2) pages attempt to limit the narrow tailoring analysis in *McCullen* to its facts, arguing that *McCullen* addressed a law that, unlike RSA 659:35(I), imposed limitations on "normal conversation and leafleting on a public sidewalk"—a place which is "historically more closely associated to the transmission of ideas than others." *See* State's Memo. at 15-16.[2] The State is wrong for at least three reasons. *First*, no such limiting principle exists in *McCullen*. *McCullen*'s narrow tailoring analysis is—quite rightly—focused broadly on whether a regulation inappropriately bans innocent, protected speech that is wholly unrelated to the government's actual interests it is seeking to protect. The 35-foot buffer zone was unconstitutional in *McCullen* not just because it dealt with speech restrictions on a sidewalk; it was unconstitutional because its restrictions on public fora swept in innocent and peaceful "conversation and leafletting" speech that bore no nexus to the

[2] Defendant's brief makes reference to Secretary of State Gardner's deposition testimony that RSA 659:35(I) furthered the State's interest to avoid situations like (i) when Germany purportedly allowed voters to voluntarily show their ballots as they were voting during the plebiscite election of 1938 in Austria after Germen troops entered the country, and (ii) when Saddam Hussein conducted elections using the single question, "do you wish to keep President Hussein … as president of the Democratic Republic of Iraq, Yes or No?" *See* State's Br. at 4-5. Setting aside the facts that these historical assertions are unverified and that Secretary Gardner obviously is not an expert qualified to testify on German or Iraqi history, this justification is nonsensical. It can hardly be said that allowing voters to voluntarily (free from coercion) engage in innocent, political speech using a marked ballot in a democratic society is remotely equivalent to a totalitarian regime where voters are compelled and coerced to disclose their ballots to government officials—conduct which is already illegal under RSA 659:40(I-II).

government's interests in promoting "public safety, patient access …, and the unobstructed use of public sidewalks and roadways." *McCullen*, 134 S. Ct. at 2535. RSA 659:35(I) is no different in that it encompasses speech in a vital forum unrelated to voter corruption.

Second, the State incorrectly relies on *McCullen* to make the broad suggestion that the government has greater latitude to restrict speech on the Internet because, unlike sidewalk speech, it is not "historically more closely associated to the transmission of ideas." *See* State's Memo. at 16. *McCullen* imposes no such limitation. Such a limitation would, if adopted, both seriously undermine free speech on the Internet and ignore the obvious reality that the Internet is 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 v. ACLU*, 521 U.S. 844, 870 (1997); *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.").[3]

Third, the State incorrectly relies on *McCullen* to minimize the burdens RSA 659:35(I) places on innocent online speech. The State claims that, while the restriction in *McCullen* effectively banned *all* face-to-face communications within the buffer zone, the challenged law is less burdensome because it does not ban messages concerning how one has voted outside the context of a market ballot. *See* State's Memo at 2 (the law does not "prevent a voter from expressing how they voted by any other means other than by use of an official ballot"). In essence, the State has determined, in its infinite wisdom, that it is just as effective to communicate how one has voted or one's experience at the polls verbally or in writing, as opposed to through

[3] The Internet has become so integral to modern life that the First Circuit Court of Appeals has even looked skeptically at Internet restrictions imposed on individuals on supervised release who did not engage in an Internet crime and have not used the Internet impermissibly. *See, e.g., United States v. Perazza-Mercado*, 553 F.3d 65, 72 (1st Cir. 2009); *United States v. Ramos*, 763 F.3d 45, 60 (1st Cir. 2014).

the salient imagery of the marked ballot. Fortunately, the State does not get to make this choice under the First Amendment.[4] It bears repeating that the State's argument "is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." *See Reno v. ACLU*, 521 U.S. 844, 880 (1997). Indeed, "[i]n invalidating a number of laws that banned leafletting on the streets *regardless of their content*, [the 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.* (emphasis added).[5] The Supreme Court has also struck down statutes for not preserving ample alternative channels where the statutes relegate the speaker to options that are "less effective media for communicating the message that is conveyed." *See Linmark Assoc. Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (overturning sign ordinance that prohibited speech that is "both unique and important").

Applying these principles, the burden imposed by RSA 659:35(I) is worse than the burden imposed in *McCullen*. Like the *de facto* total ban on face-to-face communications imposed within *McCullen*'s buffer zone, RSA 659:35(I)'s imposes a total prohibition of a compelling form of photographic communication that does not just convey how one voted, but also paints a picture of pride and one's experience at the polls. The Plaintiff speakers view this speech as salient and necessary to effectively communicate their desired messages. *See* AVC ¶ 42. Without the photograph, the message is far less effective. But RSA 659:35(I)'s ban goes even further. While the *McCullen* ban allowed face-to-face communications outside the buffer zone, RSA 659:35(I)

[4] *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) ("[T]he choice among these alternative approaches is not ours to make or the [legislature's]. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.").

[5] In this analysis, the State appears to merge the elements of narrow tailoring and alternative channels. If this Court concludes that RSA 659:35(I) is not narrowly tailored, then it need not engage in the alternative channels analysis. *See McCullen*, 134 S. Ct. at 2540 n.9.

bans *all* speech made through a photograph of a marked ballot *everywhere at any time*.

Finally, the State unsuccessfully attempts to analogize RSA 659:35(I) to *Burson*'s ban on the display or distribution of campaign materials within 100 feet of the entrance to a polling place. *See* State's Memo. at 15-16. *Burson v. Freeman*, 504 U.S. 191 (1992) actually supports Plaintiffs' position. In *Burson*, the 100-foot electioneering buffer zone 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*, RSA 659:35(I) broadened existing law to regulate behavior *beyond* the polling place after the voter has placed his or her ballot in the ballot box. The State has conceded this point. *See* State's Memo. at 2, 4 (noting that prior version of the law only concerned the polling place). In fact, the challenged law *indefinitely* bans the posting of one's ballot on the Internet, including *postings made in one's own home months or even years after the election*. Biss. Aff. ¶ 4, *Ex. C* (Scanlan Depo. 28:11-20) (acknowledging lack of time limitation); *see also Ladue*, 512 U.S. at 58 (noting "[a] special respect for individual liberty in the home").

Plaintiffs do not dispute the importance of the secret ballot and the role it has played in ensuring free and fair elections throughout the United States since the late nineteenth century. *See Burson*, 504 U.S. at 198-206. However, any generalized governmental interest in ballot secrecy—an interest that the State has not explicitly raised in this case—implicates the legitimate goal to ensure that individuals are not compelled to *involuntarily* disclose their marked ballots to others. But one's ability to *voluntary* publish online a photograph of a marked ballot from the privacy of one's own home as a form of political speech after an election is altogether different. This distinction is not novel. Even before the smartphone era, many states—including New Hampshire

(before HB 366), Pennsylvania, Utah (before 2015), 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, only prohibiting the display in the polling place before one was to place the ballot in the ballot box). Today, several states (Maine, Oregon, and Utah) 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* Biss. Aff. ¶ 6, *Ex. E* (50-State Survey).[6] It is New Hampshire's new law that is exceptional, as it is the first to explicitly ban all such online messages made outside the polling place at any time. Accordingly, because RSA 659:35(I)'s limitation on speech greatly exceeds the restrictions imposed in *Burson*, the law fails.

III. RSA 659:35(I) Is Impermissibly Overbroad[7]

For many of the same reasons RSA 659:35(I) is not narrowly tailored, the law is also impermissibly overbroad. "[A] substantial number of its applications are unconstitutional, judged in relation to [any] plainly legitimate sweep." *See United States v. Stevens*, 559 U.S. 460, 473 (2010). RSA 659:35(I) essentially creates a "First Amendment Free Zone" when it comes to engaging in innocent speech—whether online or otherwise—using a photograph of one's marked ballot outside the polling place. Again, Plaintiffs do not dispute the governmental interest in addressing voter corruption, but the State is constitutionally required to pursue such goals "through the enactment and enforcement of [laws] directed with reasonable specificity toward the conduct to be prohibited." *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Here,

[6] In late March 2015, Utah became the latest state to explicitly legalize the display of a photograph of a marked ballot. *See* 2015 House Bill 72 amending Utah Code § 20A-3-504, *available at* http://le.utah.gov/~2015/bills/static/HB0072.html (making 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").

[7] If this Court concludes that RSA 659:35(I) is not narrowly tailored, then it need not decide whether the challenged law is also overbroad. *See McCullen*, 134 S. Ct. at 2540 n.9.

whatever legitimate sweep RSA 659:35(I) may have is dwarfed by the number of its applications that have no constitutional justification. The State even appears to concede that RSA 659:35(I) sweeps within its scope innocent speech. *See* State's Memo. at 18-19 (acknowledging examples).

The State's reliance on the overbreadth analysis in *Hill* is also misplaced. *Hill*'s overbreadth analysis centered on whether the buffer zone there was a "reasonable restriction on the time, place, or manner of protected speech." *See Hill*, 530 U.S. at 731. Even applying *Hill*'s overbreadth (i.e., time, place, and manner) framework, RSA 659:35(I) is unconstitutionally overbroad because it—like the buffer zone restriction in *McCullen*—is not tailored to the State's asserted interests for the reasons stated above. Unlike the circumscribed buffer zones in *Hill* and *McCullen* which by definition only regulated speech in a finite area, RSA 659:35(I) operates as a total ban on *all* speech using a photograph of a marked ballot *everywhere, at all times, and in all places*. Moreover, unlike the comprehensive scheme in *Hill* that banned all speech within a buffer zone and "merely regulate[d] the places where communications may occur," *see id*., RSA 659:35(I) is far worse because it targets for exclusion a specific and powerful form of communication that the State disfavors—namely, messages made through the photographic display of a marked ballot. Thus, the State here is engaging in direct discrimination that did not exist in *Hill*. The Secretary of State's Office repeatedly acknowledged at deposition that the law even specifically *targeted* innocent speech unrelated to voter corruption.[8] Accordingly, RSA 659:35(I) is substantially overbroad.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment.

[8] *See* Biss. Aff. ¶ 2, *Ex. A* (Gardner Depo. 27:3-16; 59:15-22; 61:3-13); Biss. Aff. ¶ 4, *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); *see also Hill*, 530 U.S. at 731 (noting that the buffer zone restriction did not "attempt[] to regulate nonprotected activity").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilles Bissonnette, hereby certify that a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Gilles Bissonnette
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