

Proscriptions Against Ballot Selfies

Hill v. Williams (1:16-cv-2627) and *Harlos v. Morrissey* (1:16-cv-2649) (Christine M. Arguello, D. Colo.), *Silberberg v. Board of Elections* (P. Kevin Castel, S.D.N.Y. 1:16-cv-8336), and *ACLU of Northern California v. Padilla* (William Alsup, N.D. Cal. 3:16-cv-6287)

From eight to 15 days in advance of the 2016 general election, federal actions in three states sought relief from proscriptions on “ballot selfies”—photographs of ballots taken by voters completing them. These actions and previous actions in three other states pitted freedom of expression against the secret ballot. Some district and circuit judges favored freedom of expression; others favored the secret ballot.

Subject: Polling place activities. *Topics:* Laches; case assignment.

A ballot selfie is a photograph, typically taken with a smart phone, of a completed ballot that may or may not include an image of the voter’s self.¹ Is political speech or the secret ballot more important?²

Election-Eve Cases

Colorado

Three voters filed a federal complaint in the District of Colorado on October 24, 2016, about two weeks before a November 8 presidential election, against Colorado’s secretary of state and its attorney general and Denver’s district attorney, challenging a state statute making it a misdemeanor to show someone a ballot to reveal its contents: “Speech about how one votes in an election rests at the core of political speech protected by the First Amendment.”³ With their complaint, the voters filed a motion for a preliminary injunction.⁴

Judge Christine M. Arguello set the case for hearing on November 2.⁵

On October 25, a second set of three voters filed a similar federal complaint in the District of Colorado against the same three defendants.⁶ With

1. *Rideout v. Gardner*, 838 F.3d 65, 67 (1st Cir. 2016).

2. *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 459 (S.D.N.Y. 2017) (“Posting a photograph of one’s marked ballot to social media is indisputably a potent form of political speech, presumptively entitled to protection under the First Amendment. [But the] State of New York has a compelling interest in preventing vote buying and voter coercion.”); see Alejandro Lazo, “Ballot Selfie” Bans Disputed, *Wall St. J.*, Nov. 3, 2016, at A4; see also Think Before You Shoot! Ballot Selfies May Be Illegal in Your State, www.courtroomstrategy.com/2016/11/think-before-you-shoot-ballot-selfies-may-be-illegal-in-your-state/.

3. Complaint, *Hill v. Williams*, No. 1:16-cv-2627 (D. Colo. Oct. 24, 2016), D.E. 1; see Second Amended Complaint, *id.* (Dec. 29, 2016), D.E. 47; Amended Complaint, *id.* (Nov. 1, 2016), D.E. 22; see also Colo. Rev. Stat. § 1-13-712 (2016).

4. Preliminary Injunction Motion, *Hill*, No. 1:16-cv-2627 (D. Colo. Oct. 24, 2016), D.E. 7.

5. Docket Sheet, *id.* (Oct. 24, 2016) [hereinafter *Hill* Docket Sheet] (D.E. 10, 27).

6. Complaint, *Harlos v. Morrissey*, No. 1:16-cv-2649 (D. Colo. Oct. 25, 2016), D.E. 1.

their complaint, the voters filed a motion for a temporary restraining order and a preliminary injunction.⁷ Judge John L. Kane set the case for hearing on October 28,⁸ but on October 26 he transferred the case to Judge Arguello as related to her case.⁹ She set the case for hearing on November 2.¹⁰

[I]n light of the fact that the mail-in ballots have gone out to all registered voters in Colorado and the presidential election is on November 8th, this Court had no choice but to expedite the hearing of the motions and to curtail the time that the defendants would normally have to respond to those motions.¹¹

A second day of hearing in both cases was held on November 3.¹²

New York

Three voters challenged New York's misdemeanor proscription against ballot selfies with a federal complaint filed in the Southern District of New York against state and local election officials and two county district attorneys on October 26, 2016.¹³ Judge P. Kevin Castel set the case for hearing on November 1 with an instruction to explain why the plaintiffs waited until 13 days before the election to file the complaint.¹⁴

California

An October 31 federal complaint filed in the Northern District of California by the ACLU against California's secretary of state challenged a statute that had already been repealed but would remain in effect through the end of 2016.¹⁵ The ACLU sought a temporary restraining order and a preliminary injunction.¹⁶ Judge William Alsup set the case for "the earliest possible hearing," which was November 2.¹⁷

7. Motion, *id.* (Oct. 25, 2016), D.E. 6.

8. Docket Sheet, *id.* (Oct. 25, 2016) [hereinafter *Harlos* Docket Sheet] (D.E. 7).

9. Order, *id.* (Oct. 26, 2016), D.E. 11.

10. *Harlos* Docket Sheet, *supra* note 8 (D.E. 13, 27).

11. Transcript at 6, *Hill v. Williams*, No. 1:16-cv-2627 (D. Colo. Nov. 2, 2016, filed Dec. 5, 2016), D.E. 36.

12. Transcript, *id.* (Nov. 3, 2016, filed Dec. 5, 2016), D.E. 37.

13. Complaint, *Silberberg v. Bd. of Elections*, No. 1:16-cv-8336 (S.D.N.Y. Oct. 26, 2016), D.E. 1; *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 460 (S.D.N.Y. 2017); *see* N.Y. Elec. Law § 17-130(10) (2016); *see also* *Silberberg v. Bd. of Elections & Comm'rs*, No. 1:16-cv-8334 (S.D.N.Y. Oct. 26, 2016) (defective case filing).

14. Order to Show Cause, *Silberberg*, No. 1:16-cv-8336 (S.D.N.Y. Oct. 26, 2016), D.E. 5.

15. Complaint, *ACLU of N. Cal. v. Padilla*, No. 3:16-cv-6287 (N.D. Cal. Oct. 31, 2016), D.E. 1; *see* Cal. Elec. Code § 14276 (2016) ("After his or her ballot is marked, a voter shall not show it to any person in such a way as to reveal its contents."), *repealed by* 2016 Cal. Stat. c. 813 (A.B.1494), § 1, *eff.* Jan. 1, 2017; *id.* § 14291, *as amended* (2017) ("A voter may voluntarily disclose how he or she voted if that voluntary act does not violate any other law.").

16. Application, *ACLU of N. Cal.*, No. 3:16-cv-6287 (N.D. Cal. Oct. 31, 2016), D.E. 3.

17. Order, *id.* (Oct. 31, 2016), D.E. 8; Transcript at 3, *id.* (Nov. 2, 2016, filed Nov. 2, 2016), D.E. 14 [hereinafter *ACLU of N. Cal.* Transcript]; *see id.* at 52 ("the fastest possible hearing").

Previous Litigation in Other States

New Hampshire

Applying intermediate scrutiny on September 28, the U.S. Court of Appeals for the First Circuit held New Hampshire's proscription on ballot selfies to not be narrowly tailored to serve a significant government interest, because there was no showing that vote buying or coercion was an actual problem.¹⁸ The court of appeals affirmed an August 11, 2015, decision by District of New Hampshire Judge Paul Barbadoro¹⁹ in a case filed on October 31, 2014.²⁰

Indiana

Southern District of Indiana District Judge Sarah Evans Barker issued a preliminary injunction against criminal penalties for ballot selfies in Indiana on October 19, 2015.²¹ Judge Barker made the injunction permanent by summary judgment on January 19, 2017.²² Judge Barker found insufficient justification for the content-based restriction.²³

Since issuing our preliminary injunction, the State has had seven months—a span of time which included the 2015 election cycle and the 2016 primaries—to fully develop a factual record that would establish an ongoing problem of vote buying in Indiana. . . .

...

[The proscription] extends far beyond the targeted speech in attempting to prevent vote buying. . . . [W]e fail to see how banning voters from taking photos of unmarked ballots in any way serves the statute's goal of protecting voters from vote buying and voter coercion. More particularly, even the prohibition on taking and sharing pictures of marked ballots draws into its ambit voters who may choose to take photos for entirely legitimate and legally innocuous reasons.²⁴

Indiana's secretary of state decided not to appeal.²⁵

18. *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 581 U.S. ___, 137 S. Ct. 1435 (2017); see Joe Palazzolo, *Voided Ban on Ballot Selfies Will Stand*, Wall St. J., Apr. 4, 2017, at A3.

19. *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015).

20. Docket Sheet, *Rideout v. Gardner*, No. 1:14-cv-489 (D.N.H. Oct. 31, 2014).

21. Opinion, *Ind. Civil Liberties Union Found. v. Ind. Sec'y of State*, No. 1:15-cv-1356 (S.D. Ind. Oct. 19, 2015), D.E. 32, 2015 WL 12030168; see Transcript at 11–12, *id.* (Oct. 13, 2015, filed Mar. 28, 2017), D.E. 61 (Judge Barker's noting that "[t]his statute was enacted after the District Court in New Hampshire in *Rideout* had made its decision" and that selfie proscriptions are somewhat "impractical in this day and age where pictures are taken of everything"); Complaint, *id.* (Aug. 27, 2015), D.E. 1.

22. *Ind. Civil Liberties Union Found. v. Ind. Sec'y of State*, 229 F. Supp. 3d 817 (S.D. Ind. 2017).

23. See *id.* 824.

24. *Id.* at 824–26.

25. Motion, *Ind. Civil Liberties Union Found. v. Ind. Sec'y of State*, No. 17-1356 (7th Cir. Apr. 25, 2017), D.E. 12; see Dismissal Order, *id.* (Apr. 25, 2017), D.E. 13.

Michigan

By a vote of two to one, on October 28, 2016, the U.S. Court of Appeals for the Sixth Circuit thought that a “ban on photography at the polls seems to be a content-neutral regulation that reasonably protects voters’ privacy—and honors a long tradition of protecting the secret ballot.”²⁶ But the court did not resolve the merits of the case, because it thought that Western District of Michigan Judge Janet T. Neff’s October 24 injunction against the proscription fell too close to the election.²⁷ Judge Neff decided on August 30, 2018, that the plaintiffs had standing to pursue an amended complaint.²⁸

Resolution of the New Cases

California

On November 2, 2016, Judge Alsup denied the plaintiffs an immediate injunction against ballot selfie proscriptions.²⁹

THE COURT: All right. I have a decision to make, whether to do this orally from the bench or to take a few days and write an order.

But in light of the timing of the election coming up, and I want as a courtesy to both sides to give you my ruling so that if either side wishes to take an appeal to the court of appeals it can be at least lodged before the election occurs.

...

Now the question has come up: Why didn’t the ACLU bring this lawsuit sooner? None of their explanations make any sense to me.³⁰

Judge Alsup expressed concern about two things. First, the challenged statute protected the secret ballot.

THE COURT: . . . I’m old enough to remember the days when employers would take busloads of people to the polling place in other states. And I—there’s a reason for this law. And if you didn’t show the employer how you voted for their favorite guy, you got fired or the union boss did the same thing to you.³¹

Second, the relief sought would create uncertainty about the extent to which disruptive selfies could be prevented: prolonged photographic sessions, the

26. *Crookston v. Johnson*, 841 F.3d 396, 399–400 (6th Cir. 2016).

27. *Id.* at 397–99, 401; *Crookston v. Johnson*, 854 F.3d 852 (6th Cir. 2016) (deferring further review of the merits until final resolution of the district court case); *see* Opinion, *Crookston v. Johnson*, No. 1:16-cv-1109 (W.D. Mich. Oct. 24, 2016), D.E. 18, 2016 WL 9281943; Complaint, *id.* (Sept. 9, 2016), D.E. 1.

28. Opinion, *Crookston*, No. 1:16-cv-1109 (W.D. Mich. Aug. 30, 2018), D.E. 74; Amended Complaint, *id.* (Oct. 11, 2017), D.E. 65.

29. Order, *ACLU of N. Cal. v. Padilla*, No. 3:16-cv-6287 (N.D. Cal. Nov. 2, 2016), D.E. 13; Minutes, *id.* (Nov. 2, 2016), D.E. 15; *ACLU of N. Cal.* Transcript, *supra* note 17, at 60.

30. *ACLU of N. Cal.* Transcript, *supra* note 17, at 47, 53; *see id.* at 58 (“no one is at fault more than the ACLU for waiting as long as they did for bringing this lawsuit and trying [to] jam this through at the last minute”).

31. *Id.* at 8.

use of cumbersome equipment such as a selfie stick, and whether photos would include persons other than the voter.³²

Following the election, the plaintiffs voluntarily dismissed their case.³³

Colorado

On November 4, District of Colorado Judge Arguello enjoined criminal prosecutions for ballot selfies.³⁴ Judge Arguello did not enjoin the selfie proscription per se, just criminal penalties for its violation:

This Court has no intention of disrupting the upcoming election in Colorado. Indeed, it is exactly for this reason that the Court has narrowly tailored its injunction to ensure that it does not alter existing election laws or rules. Furthermore, it has not enjoined the Secretary of State in any way and its injunction does not affect procedures or rules at polling places. Specifically, if local rules at polling places prohibit the use of cameras due to privacy concerns, nothing in this Court's Order prohibits the enforcement of those rules.³⁵

The Colorado litigation was mooted on March 16, 2017, with the enactment of legislation permitting ballot selfies in Colorado.³⁶

New York

On November 3, 2016, Southern District of New York Judge Castel ruled that the secret ballot trumped political expression and the equities cautioned against a last-minute change.³⁷

Because of the statute, those who would engage in ballot policing, for the purpose of bribery or to enforce orthodoxy among members of a group, whether members of [a] union, employees of a company, or members of a religious group, have long[] been deprived of an essential tool for success. The absence of recent evidence of this kind of voter bribery or intimidation does not mean that the motivation to engage in such conduct no longer exists. Rather, it is consistent with the continued effectiveness of the New York statute.

32. *Id.* at 51–60.

33. Notice, *ACLU of N. Cal.*, No. 3:16-cv-6287 (N.D. Cal. Nov. 18, 2016), D.E. 16.

34. Opinion at 26, *Hill v. Williams*, No. 1:16-cv-2627 (D. Colo. Nov. 4, 2016), D.E. 33, 2016 WL 8667798.

35. *Id.* at 17.

36. openstates.org/co/bills/2017A/HB17-1014/; Order, *Harlos v. Morrissey*, No. 16-1471, and *Hill v. Morrissey*, No. 16-1470 (10th Cir. Apr. 14, 2017) (accepting a voluntary dismissal of the appeals); see Order, *Harlos v. Morrissey*, No. 1:16-cv-2649 (D. Colo. Feb. 10, 2017), D.E. 55 (administratively closing the case); Order, *Hill*, No. 1:16-cv-2627 (D. Colo. Feb. 10, 2017), D.E. 62 (same); Notice, *Harlos*, No. 1:16-cv-2649 (D. Colo. June 20, 2017), D.E. 67 (noting settlement as to attorney fees); Notice, *Hill*, No. 1:16-cv-2627 (D. Colo. June 12, 2017), D.E. 67 (same); Notice, *Harlos*, No. 1:16-cv-2649 (D. Colo. June 7, 2017), D.E. 63 (same); see also Kristen Wyatt, *Ballot Selfie Bill Goes to Governor*, *Denver Post*, Mar. 3, 2017, at 5A.

37. *Silberberg v. Bd. of Elections*, 216 F. Supp. 3d 411 (S.D.N.Y. 2016); *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 460 (S.D.N.Y. 2017).

This action was commenced 13 days before the presidential election, even though the statute has been on the books longer than anyone has been alive. Selfies and smartphone cameras have been prevalent since 2007. A last-minute, judicially-imposed change in the protocol at 5,300 polling places would be a recipe for delays and a disorderly election, as well-intentioned voters either took the perfectly posed selfie or struggled with their rarely-used smartphone camera. This would not be in the public interest, a hurdle that all preliminary injunctions must cross.³⁸

Following an August 29 to 31, 2017, bench trial on an amended complaint,³⁹ Judge Castel concluded that the proscription on ballot selfies survives strict scrutiny, “for a law prohibiting the display [of] a marked ballot only for the purpose of vote buying or coercion would be ineffective.”⁴⁰

38. *Silberberg*, 216 F. Supp. 3d at 414–15 (footnote omitted).

THE COURT: . . . [T]he philosophy was not to permit a secret ballot, but the Australian Ballot Movement of the late 19th Century required the voter to cast a secret ballot even if the voter wanted to cast a public ballot, so that an employer or maybe a church leader or a group leader could not enforce Orthodoxy on the members, could not bribe a voter.

Transcript at 20, *Silberberg v. Bd. of Elections*, No. 1:16-cv-8336 (S.D.N.Y. Nov. 1, 2016, filed Nov. 15, 2016), D.E. 23.

39. Transcripts, *Silberberg*, No. 1:16-cv-8336 (S.D.N.Y. Aug. 29 and 31, 2017, filed Sept. 18 and 22, 2017), D.E. 142 and 149; *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 460 (S.D.N.Y. 2017); see Second Amended Complaint, *Silberberg*, No. 1:16-cv-8336 (S.D.N.Y. Apr. 17, 2017), D.E. 90; Amended Complaint, *id.* (Dec. 9, 2016), D.E. 26; see also Docket Sheet, *supra* (D.E. 23, 26, 45, 46, 49, 72) (repeated efforts to file the amended complaint).

40. *Silberberg*, 272 F. Supp. 3d at 459.