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POLITICS

Selfies in Voting Booths Raise Legal Questions on Speech and Secrecy

By **ERIK ECKHOLM** AUG. 24, 2015

People post selfies with their strawberry daiquiris and their calico kittens, with strangers and friends, with and without clothes. So it was inevitable, perhaps, that some might take photographs inside the voting booth to show off their completed ballots.

Excited first-time voters; those proud to show that they voted for or against, say, President Obama; and those so disgusted that they wrote in the name of their dead dog have all been known to post snapshots of their ballots on Twitter or Facebook.

Now, a legal fracas has erupted over whether the display of marked ballots is a constitutionally protected form of speech and political expression — as a federal court in New Hampshire declared this month, overturning a ban on such photographs — or a threat to the hallowed secret ballot that could bring a new era of vote-buying and voter intimidation.

The New Hampshire case is unlikely to be the last to grapple with what are commonly called ballot selfies, whether they include an image of the phone user or not. Numerous states have laws to protect voter secrecy, drafted in an earlier era, that could be construed to ban ballot photographs, said Gilles Bissonnette, the legal director of the American Civil Liberties Union of New Hampshire, which challenged the New Hampshire ban.

A new law in Indiana explicitly bans taking photographs in a voting booth, and rights advocates there are mulling a similar challenge. At the same time, Maine, Oregon and Utah have recently revised their laws, effectively permitting the posting of these images.

In New Hampshire, officials and legislators were so alarmed by the dangers of cellphone photos in voting booths that they outlawed them in 2014, setting a fine of up to \$1,000 for showing photographs of completed ballots to others or posting them on social media.

“It’s a sacred area where you vote,” said William M. Gardner, the secretary of state of New Hampshire, a Democrat and the chief proponent of the law.

Mr. Gardner cited the writings of Alexander Hamilton and James Madison, New Hampshire’s history as the first colony to write its own constitution in 1776, and the state’s “Live Free or Die” slogan. For good measure, in legal proceedings and in an interview, he also invoked the ominous specter of coercive elections run by Saddam Hussein and Hitler.

What ended the flagrant vote-buying and intimidation of the 19th century in America, Mr. Gardner and political historians note, was the advent of truly secret ballots, leaving would-be vote buyers and political bullies unable to verify if their instructions had been carried out. But with the ubiquity of cellphone cameras, the argument goes, that hard-won privacy and security for voters is in danger. Vote-buyers, or a boss demanding that you support a candidate, could demand a photograph of the completed ballot to prove how you voted.

Civil liberties advocates and some conservatives and libertarians in New Hampshire, in an unusual coalition, were quick to condemn the 2014 law as a chilling overreaction to a speculative threat — also summoning the “Live Free or Die” slogan to support their position.

“The problem with this law is that it was an outright ban on an innocent form of communication,” Mr. Bissonnette of the A.C.L.U. said. “It didn’t ban displays involved in vote buying or intimidation. It banned all displays, including ones that carried political messages.”

“The best way to combat vote buying and coercion is to investigate and prosecute cases of vote buying and coercion,” Mr. Bissonnette said.

The A.C.L.U. sued in Federal District Court. The plaintiffs included two Republican candidates for the State House of Representatives in 2014 who defiantly posted images of their own primary ballots. One of them, Brandon Ross, a lawyer who describes himself as a “small ‘I’ libertarian” and who lost his run, added the challenge, “Come at me, bro,” to the ballot photograph posted on his Facebook page.

A third plaintiff, Andrew Langlois, was aware of the new law when he posted a photograph of his ballot on Facebook, writing that because he disliked all of the candidates, “I did a write-in of Akira,” his recently deceased dog. All three plaintiffs received phone calls from the authorities.

These acts of civil disobedience prompted what The Concord Monitor called a “mini-movement,” with dozens more ballot selfies appearing on social media after the November election, some on the site of a Facebook group, NH Ballot Selfies.

On Aug. 11, in a 42-page opinion that reviewed the history of ballot secrecy and voter intimidation, Judge Paul Barbadoro of Federal District Court in Concord struck down the law.

The state provided no evidence of “an actual or imminent problem with images of completed ballots being used to facilitate either vote buying or voter coercion,” Judge Barbadoro said.

“The new law is invalid,” he said, “because it is a content-based restriction on speech that cannot survive strict scrutiny,” the most stringent standard for judging infringements on fundamental rights.

Many constitutional scholars praised the decision. So heads snapped last week when Richard L. Hasen, a prominent elections expert at the School of Law at the University of California, Irvine, called Judge Barbadoro’s opinion misguided and said allowing the photography posed a real risk.

In “Why the Selfie is a Threat to Democracy,” an article posted last Tuesday by Reuters and on the Election Law Blog he edits, Mr. Hasen wrote that the court decision “might seem like a victory for the American Way.”

“But the judge made a huge mistake,” he continued, “because without the ballot-selfie ban, we could see the re-emergence of the buying and selling of votes — and even potential coercion from employers, union bosses and others.”

The author of the disputed law, Representative Timothy Horrigan, a Democrat, noted that courts had upheld other restrictions on activity inside polling places, like a ban on campaigning. Still, in a Twitter comment on Mr. Hasen’s article, Michael McDonald, a specialist in American elections at the University of Florida, said that “reality is nowhere near your hysteria.”

Erwin Chemerinsky, the dean of Mr. Hasen’s law school, said in an email that he disagreed with Mr. Hasen. The New Hampshire law, he said, “is a content-based restriction on speech, and I don’t think that there is sufficient evidence of harm to meet strict scrutiny.”

Support for Mr. Hasen’s position was voiced by Doug Chapin, the director of the program for excellence in election administration at the University of Minnesota. “I still think ballot selfies create a vulnerability in the election process that vastly outweighs any societal or personal benefit the selfie brings,” he wrote in an email. “Perhaps that’s generational, but I think it’s something worth thinking — and worrying — about going forward.”

Mr. Gardner, an ardent proponent of ballot-selfie controls, said he expected New Hampshire to appeal the ruling.

A version of this article appears in print on August 25, 2015, on page A10 of the New York edition with the headline: Secret Ballots Made Public Draw Questions of Free Speech .