UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-2627

OWEN HILL, and
SCOTT ROMANO,

Plaintiffs,

vs.

WAYNE W. WILLIAMS, Colorado Secretary of State, in his official capacity, and
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Owen Hill is an incumbent Colorado state senator. Scott Romano is a first-time voter. Whether a candidate for public office or an elector, citizens often take great pride in their votes and celebrate them. One such form of advocacy that has become popular in recent years is the "ballot selfie," a photograph of one's own marked ballot that is usually shared on social media. Rather than embrace this new platform of political speech, some state actors have elected to broadly interpret existing laws to punish political speech with up to a year in jail and a $1,000 fine.

Ballot selfies are a fundamental act of free speech, not a threat to ballot integrity. In fact, in all three States where laws similar to Colorado's have been challenged in the past two years, courts have uniformly struck down the laws as violating the First

Amendment. *See Ind. Civil Liberties Union Found. Inc. v. Ind. Sec'y of State*, No. 15-CV-1356-SEB-DML, 2015 WL 12030168 (S.D. Ind. Oct. 19, 2015) (Striking down Indiana ban on ballot selfies); *Crookston v. Johnson*, No. 16-cv-1109, slip op. (W.D. Mich. Oct. 24, 2016) (striking down Michigan ballot selfie ban), **copied attached as Ex. A**; *Rideout v. Gardner*, 123 F. Supp. 3d 218, 226–27 (D. N.H. 2015) (detailing an investigation by the New Hampshire attorney general of Andrew Langlois, who posted a ballot photograph of his write-in vote for his recently deceased dog, Akira), *Rideout v. Gardner*, No. 15-2021, ___ F.3d ___, 2016 WL 5403593 (1st Cir. Sept. 28, 2016). No court appears to have upheld such a law in the context of ballot photographs.

Nor do ballot selfies pose any risk of unduly influencing fellow voters. Nevertheless, state law threatens the Plaintiffs and all Colorado voters with fines and even imprisonment for this simple, effective act of political speech. Rather than risk criminal charges for these activities, the Plaintiffs bring this action to require ballot photography restrictions to comply with the First Amendment, and seek injunctive relief before the general election on November 8, 2016.

This lawsuit endeavors to respect the integrity of the voting process, including ballot secrecy, while calling upon this Court to recognize that circumstances today—namely, the advancement of technology and the advent of new outlets for political speech through social media on the Internet—require existing law to be more reasonably tailored. *See* Compl. ¶16 (detailing Plaintiffs' numerous social media accounts). "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 340 (2010). Ballot selfies are not a

problem to be solved: they are a valuable form of political expression that allow voters to tell their friends and the world over not merely that they voted, and not merely whom they claim to have voted for, but for whom they actually voted (or didn't vote for, as the case may be).

In the Tenth Circuit, the grant of preliminary injunctive relief is "within the sound discretion of the district court." *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989). In order to secure a preliminary injunction, a movant must demonstrate: (1) a substantial likelihood of success on the merits; (2) irreparable injury will result if the injunction does not issue; (3) the threatened injury to the movant outweighs any damage the injunction may cause the opposing party; and (4) issuance of the injunction would not be adverse to the public interest. *Derma Pen, LLC v. 4EverYoung Ltd.*, 773 F.3d 1117, 1119 (10th Cir. 2014). In First Amendment challenges, "the 'likelihood of success on the merits will often be the determinative factor' because of the seminal importance of the interests at stake." *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) (citation omitted). Plaintiffs have met all of these factors, and this Court should issue a preliminary injunction enjoining the enforcement of C.R.S. § 1-13-712(1) against photographing one's own ballot and displaying such media outside of polling places.

Contemporaneous with filing this motion for a preliminary injunction, the Plaintiffs will file a motion for a forthwith hearing and request the opportunity to present evidence and legal argument in support of this motion for timely relief.

Conferral: Plaintiffs have conferred with Defendants Counsel about their position to this motion by email and telephone on October 24, 2016 and, at the time of filing, do not have the Defendants final position on the motion. Plaintiffs will update the conferral notice when available.

ARGUMENT

I. Plaintiffs have a substantial likelihood of showing that C.R.S. § 1-13-712(1) is unconstitutional under the First Amendment.

The following statute is the focus of this action:

> (1) Except as provided in section 1-7-108, *no voter shall show his ballot after it is prepared for voting to any person in such a way as to reveal its contents*. No voter shall place any mark upon his ballot by means of which it can be identified as the one voted by him, and no other mark shall be placed on the ballot by any person to identify it after it has been prepared for voting.
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> (4) Any person who violates any provision of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished as provided in section 1-13-111.

C.R.S. § 1-13-712(1) (emphasis added). This statute reportedly originates more than a century ago, in the 1890s. On its face, this statute reaches so broadly that it prohibits any elector from displaying his or her own marked ballot in any way. Recent statements from the Denver District Attorney and the Defendant Secretary Williams indicate that this ban includes digitally photographing and displaying one's marked ballot, not only within a polling place on election day but via social media, and even prohibits photographing and displaying one's mail-in ballot. *News Release,* DENVERDA, *available at* http://www.denverda.org/News_Release/Releases/2016%20Release/Ballot%20selfies.p

df; Rachel Riley, *Springs lawmaker files challenge to 'ballot selfie' law*, COL. SPRINGS GAZETTE, Oct. 21, 2016, *available at* http://gazette.com/springs-lawmaker-files-challenge-to-ballot-selfie-law/article/1588361. Under either of these applications, C.R.S. § 1-13-712(1) is unconstitutional.

The First Amendment protects photography as free speech. *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (collecting cases); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment."). Ballot photography implicates a major purpose of the First Amendment—the protection of political speech. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976). In particular, publishing such photographs on social media, or the Internet, is also First Amendment protected activity. *Reno v. Am. Civil Liberties Union* (*ACLU*), 521 U.S. 844, 868–70 (1997) (noting that the internet is a "dynamic, multifaceted category of communication" that "includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue"); *Doe v. Shurtleff*, 628 F.3d 1217, 1222 (10th Cir. 2010) ("The Supreme Court has also made clear that First Amendment protections for speech extend fully to communications made through the medium of the internet."). The prohibition challenged here is an overbroad, unconstitutional abridgment of free speech.

A. Section 1-13-712(1) is subject to strict scrutiny and, as applied to ballot selfies, serves no governmental interest and is not reasonably tailored.

"[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). Section 1-13-712(1) is content-based because it

restricts the display of marked ballots, while allowing any other form of advocacy. This is particularly true when considering a polling place: one may not display a marked ballot—or any form of political advocacy—but may freely display one's favorite sports team, commercial logos or other non-electoral speech. *See Burson v. Freeman*, 504 U.S. 191, 196 (1992) (plurality opinion). "The required examination of the content of the image in order to enforce the terms of this statute plainly demonstrates its content-based nature." *ACLU of Ind. v. Ind. Sec'y of State*, 15-cv-01356, Doc. No. 32, at 7 (S.D. Ind. 2015) (citing *Rideout*, 123 F. Supp. 3d at 229). Content-based restrictions are subject to strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest[.]" *Reed*, 135 S. Ct. at 2231–32 (citation omitted).

Section 1-13-712(1) is unreasonable and significantly impinges upon free speech. To satisfy the strict scrutiny standard, Defendants must show that their application of the Colorado ballot speech ban is narrowly tailored to serve a compelling state interest. *See Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). An interest in voting integrity is not compelling in the abstract. The Court must "look beyond broadly formulated interests" and consider Defendants' interest in applying Colorado law to Plaintiffs, "in other words, to look to [Defendants'] marginal interest in enforcing" the Colorado ballot speech ban here. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

Restricting ballot selfies serves no governmental interest. A ballot selfie is an inseparable component of advocacy that—whether taking a ballot photo while voting in a

polling place or of one's marked mail-in ballot—actually occurs in a forum removed from a polling place or voting booth, posing no threat of intimidation or distraction upon other in-person voters, and triggering no campaigning or debates within polling places.

In other recent successful challenges to laws that restrict ballot selfies, states have argued one additional interest to justify ballot display bans beyond the polling place, which is the only interest that may apply to mail-in votes: ballot integrity. Specifically, states have argued that allowing one to photograph and publish his or her own marked ballot would too easily facilitate vote-buying schemes. *See Rideout*, 123 F. Supp. 3d at 231–33; *ACLU of Ind.*, *supra*, at 10–12. In both of these cases the courts rightfully rejected this interest as wholly speculative.

> Although it is true that vote buying was a problem in this country before the adoption of the Australian [secret] ballot, the historical record establishes that vote buying has not been a significant factor in elections in more than 100 years. Further, because . . . the technology [the law] targets has been in use for many years, it is reasonable to expect that if the problem the state fears were real, it would be able to point to some evidence that the problem currently exists.

Rideout, 123 F. Supp. 3d at 233. Colorado has banned ballot exposure for decades, and certain officials have warned against efforts to engage in ballot selfie activity, but the Defendants have not prosecuted a vote-buying scheme relating to the practice. Given that awareness of ballot selfies is dependent on their public display online, the side effects of vote buying or other unsavory applications may be easily determined. One would be hard pressed to come up with a scheme to pressure someone into voting where that person's voluntary activity of taking a picture of a voted ballot and sharing it publicly *after the fact* would even be possible, let alone probable.

Section 1-13-712(1) significantly impinges upon First Amendment rights—indeed, the law entirely forecloses truthfully evidencing how one has voted. In prohibiting ballot selfies, the restriction serves no governmental interest. It thus fails tailoring under either strict or relaxed scrutiny.

B. Alternatively, Section 1-13-712(1) fails intermediate scrutiny.

"Even content-neutral restrictions are required to be narrowly tailored to fend off any untoward attempt by the government to suppress speech out of mere convenience." *ACLU of Ind.*, *supra*, at 15 (citing *McCullen v. Coakley*, S. Ct. 2518, 2534 (2014)). Even under intermediate scrutiny, Section 1-13-712(1) must still fail in application. Recent precedent from the Supreme Court affirms that while intermediate scrutiny—unlike strict—does not require the government to utilize the least restrictive means to serve compelling interest, the government may not "forgo[] options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage." *McCullen*, 134 S. Ct. at 2537. That is, even under intermediate scrutiny this Court must determine whether the interests at issue may be addressed with "less intrusive means" or "more targeted means." *Id.* at 2538; *see Rideout v. Gardner*, -- F.3d --,, 2016 WL 5403593, slip op. at 19–20 (1st Cir. 2016).

The Defendants already have more targeted means at their disposal to address the governmental interests in question. They may prosecute someone who induces another to reveal their marked ballot, or one who otherwise reveals such information. C.R.S. §§ 1-13-712(2). They may prosecute interfering with other voters. C.R.S. § 1-13-711. They may prevent and prosecute electioneering within polling places. C.R.S. § 1-13-

714. They may prosecute vote-buying. C.R.S. § 1-13-720. The governmental interests implicated in this case may all be addressed with more targeted means that will not unduly intrude upon the First Amendment.

"At best, this statute is a blunt instrument designed to remedy a so-far undetected problem. As such, it does not survive even intermediate scrutiny." *ACLU of Ind.*, *supra*, at 16. To be sure, there is a great deal of election malfeasance that may be suitably prevented by state law, but the Defendants can offer no ties between ballot selfies and any of these acts beyond offering mere speculation.

C. Alternatively, Section 1-13-712(1) is facially overbroad, but may be narrowly construed to not prohibit ballot photography and publication.

The Supreme Court has summarized the doctrine of First Amendment overbreadth as follows:

> To succeed in a typical facial attack, [one] would have to establish "that no set of circumstances exists under which [the law] would be valid" . . . . In the First Amendment context, however, this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as 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, 472–73 (2010) (citations omitted). However, "'[i]t has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be readily susceptible to a narrowing construction that would make it constitutional, it will be upheld.'" *ACLU v. Johnson*, 194 F.3d 1149, 1159 (10th Cir. 1999) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). Ballot selfie activity is so far removed from the advocacy restrictions upheld in other cases that it is plausible

that the Section 1-13-712(1) was never intended to prohibit ballot selfies. The wording and context of the statutes suggests they might be interpreted not to sweep so broadly as to cover ballot selfies. Thus, these laws may be interpreted by this Court to only prohibit direct display of ballots within polling places.

Provisions not challenged in this lawsuit reinforce this interpretation of the law and further ensures the narrowness of ballot selfie activity:

> Before leaving the voting booth, the elector shall fold the ballot without displaying the marks thereon so that the contents of the ballot are concealed and the stub can be removed without exposing any of the contents of the ballot, and the elector must keep the ballot folded until the elector deposits the ballot in the ballot box.

C.R.S. § 1-13.5-606(1); *see also* C.R.S. § 1-7-503(1). If ballot selfies occur in voting stations, one photographs them after marking the ballot but before making an effort to deposit the ballot. The challenged law thus need not apply to ballot selfies, and in tandem with these other laws will still assure that attempts to use ballot selfie activity as actual advocacy within polling stations or to otherwise expose a marked ballot within a polling place may still be punished and deterred. Other laws not subject to this lawsuit can ensure ballot selfies are, in fact, mere disclosure of the photographer's own ballot. *See* C.R.S. § 1-13-712(3) ("No election official, watcher, or person shall reveal to any other person the name of any candidate for whom a voter has voted . . . ."). Thus, interpreting the law to not restrict the speech activity at issue will not upend Colorado election law, because a variety of provisions already protect voting integrity and against vote-buying. *See also supra* part (I)(A)(2).

The activity of taking a ballot selfie before leaving a voting station—in view of an elector and a camera but no one else in the polling place—could be construed by this Court to not meet the statute's definition of revealing the contents of one's marked ballot. This would leave the law undisturbed, properly confined to regulate advocacy *within* polling places, and protect ballot selfies—speech that takes place far beyond polling places and in the light of the public eye. Without such a construction given by this Court, however, Section 1-13-712(1) is unconstitutional facially and as applied.[1]

II. Plaintiffs will be irreparably harmed if an injunction does not issue.

Where First Amendment rights are at issue, irreparable harm is established: "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Verlo*, 820 F.3d at 1127 (quoting *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976)). Now aware of the photography prohibitions in question, Plaintiffs have silenced themselves under threat of criminal penalties. If an injunction is not issued, it will only result in further irreparable harm.

III. The equities favor enjoining Colorado's unconstitutional ballot selfie ban.

Currently, Plaintiffs are entirely prohibited from ballot selfie activity, a total loss of First Amendment freedoms. Moreover, any harm inflicted upon the Defendants is *de*

[1] Secretary Williams's interpretation that Section 1-13-712(1) applies to photography or other display of one's own marked mail-in ballot easily brings this section into facial overbreadth. Colorado has moved so far away from ballot secrecy by adopting a mandatory mail-in voting option that it is wholly unreasonable to defend the display prohibition in that context. This law might also punish leaving one's marked ballot on a kitchen table before sealing it in an envelope, looking over one's own marked ballot before putting it in its envelope at a crowded post office, and other wholly innocuous activities. There is no legitimate sweep to be had in the secrecy of marked mail-in ballots that have not been sealed in an envelope.

minimis. Even if the Defendants and prosecutors across Colorado were to decline to prosecute under this statute, it would not alleviate "sanctions [that] 'hover[] over each [voter], like the proverbial sword of Damocles[.]'" *Reno*, 521 U.S. at 882 (citation omitted). The equities overwhelmingly weigh in Plaintiff's favor.

IV. Issuing an injunction works in favor of the public interest.

"'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1308 (D. Okla. 2010) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest"). Thus, permitting Plaintiffs and other Colorado voters to speak freely serves the important goal of protecting an "essential mechanism of democracy" and our safeguard to "hold officials accountable to the people." *Citizens United*, 558 U.S. at 339.

CONCLUSION

"This isn't a new law, but the Denver District Attorney's Office said it's good to remind people in the age of social media. 'It seems kind of silly,' office spokesperson Lynn Kimbrough said." Molly Davis, *This is why you shouldn't take ballot selfies*, 9NEWS, Oct. 20, 2016, http://www.9news.com/news/local/politics/this-is-why-you-shouldnt-take-ballot-selfies/339216479. Silly laws are a problem on their own, but unconstitutional abridgements of free speech are not silly. Everyone in Colorado should have the right to speak about their voting decisions, including the ubiquitous use of cell phone pictures to

express a point. The First Amendment protects this valuable form of political discourse for all citizens. For the foregoing reasons, this Court should grant Plaintiffs' motion for preliminary injunction. A proposed order is **attached as Exhibit B.**

Respectfully submitted,

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Dated this 24th day of October, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, the foregoing Memorandum of Support of Motion for Preliminary Injunction was electronically filed with the Clerk of the Court using the CM/ECF system and will be sent electronically by email to the attorneys representing the Defendants:

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