

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-2627

OWEN HILL,
SCOTT ROMANO, and
COLIN PHIPPS.

Plaintiffs,

vs.

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

Defendants.

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Speech about how one votes in an election rests at the core of political speech protected by the First Amendment. One particularly vivid way to speak about a decision to vote or not vote is to later share a picture of a marked ballot that has been turned in. Taking a picture of a voted ballot is increasingly popular. Unfortunately, Colorado has an outmoded statute making it a crime to “show” a ballot to “any person” in such a way “as to reveal its contents.” C.R.S. § 1-13-711(1). In a classic case of an overbroad law that restricts vast swaths of legal, protected speech in the name of preventing discrete bad acts, Colorado has chilled the Plaintiffs and countless other

voters from being permitted to engage in the simple act of posting a photo of a ballot as a political expression.

2. Antiquated laws in other states, similar to Colorado's ban on ballot photography, have been struck down for violating the First Amendment by prohibiting voters from expressing themselves by sharing a picture of their marked ballot. Both Indiana and Maine's laws have been struck down. See *Rideout v. Gardner*, -- F.3d --, 2016 WL 5403593 (1st Cir. 2016) (New Hampshire law prohibiting ballot photography found facially unconstitutional); *Am. Civil Liberties Union of Ind. v. Ind. Sec. of State*, 15-cv-01356, Doc. No. 32 (S.D. Ind. 2015) (preliminary injunction against ballot photography ban). There is also a pending lawsuit in Michigan challenging a similar measure.
3. On October 20, 2016, Plaintiffs Owen Hill and Scott Romano read in various news outlets that the District Attorney of Denver was "reminding voters" that "ballot selfies are illegal in Colorado." See *News Release, October 20, 2016, Denver DA, available at http://www.denverda.org/News_Release/Releases/2016%20Release/Ballot%20selfies.pdf*. This is based off of C.R.S. § 1-13-712(1), which states that "no voter shall show his ballot after it is prepared for voting to any person in such a way as to reveal its contents."
4. According to recent reports, the Colorado Secretary of State believes this prohibition applies not only in polling places, but to mail-in ballots. See 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> ("Williams said the law, which originated in 1891, remains relevant, especially because mail-in ballots mean citizens won't have the same voting

privacy they did in polling centers. ... “[I]t’s probably more important now that you have mail ballots than it ever was before.”).

5. For these activities, according to these interpretations, Colorado law calls for imprisonment and fines. See C.R.S. §§ 1-13-712(4), 1-13-111 (violations “shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment”).
6. In order to promote political speech and discussion, Plaintiffs would like to join thousands of citizens nationwide who take “ballot selfies,” or photographs of their marked ballots, and post them on social media. See generally “selfie”, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/selfie>; see also Brief of *Amicus Curiae* Snapchat, Inc. in Support of Appellees and Affirmance, *Rideout v. Gardner*, No. 15-2021 (1st Cir.), at 25, available at <http://electionlawblog.org/wp-content/uploads/Snapchat-Ballot-Selfie-Amicus-With-ECF-Stamp.pdf> (“Snapchat has received thousands of user Snaps from inside voting booths in primaries around the country, submitted to Snapchat by users with the knowledge that their Snaps could be viewed by millions of people.”).
7. Having been made aware of the threat of enforcement, Plaintiffs are compelled to refrain from taking ballot selfies in polling places and of their mail-in ballots. If it were not for Colorado law, however, Plaintiffs would engage in taking ballot selfies in future elections, including this upcoming election on and before November 8, 2016. Compliance with the law requires Plaintiffs to sacrifice their rights to free speech under the First Amendment. U.S. CONST. amend. I. This Court should enter preliminary relief and issue a final judgment ruling that the law in question is unconstitutional. See *Rideout v. Gardner*, -- F.3d --, 2016 WL 5403593 (1st Cir. 2016); *Am. Civil Liberties*

Union of Ind. v. Ind. Sec. of State, 15-cv-01356, Doc. No. 32 2015 WL 12030168, (S.D. Ind. 2015).

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 because Plaintiffs' claims arise under the First and Fourteenth Amendments to the Constitution of the United States. This Court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, and the Civil Rights Act, 42 U.S.C. § 1983.
9. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1), (2) because Defendants reside in the District of Colorado and all of the events or omissions giving rise to the claims occurred in this district.
10. This Court has jurisdiction to award attorneys' fees, in its discretion, in this action. 42 U.S.C. § 1988(b).

PARTIES

11. Plaintiff Owen Hill is a resident of Colorado and currently lives in Colorado Springs. He serves as a Republican member of the Colorado State Senate, representing District 10, and is on the ballot for re-election on November 8, 2016. He first registered to vote in 2006, has voted in most primary and general elections since then, and is a qualified elector under Colorado law. He intends to vote in person in the general election on November 8, 2016 as well as future Colorado primary and general elections. Mr. Hill values the civic exercise of voting on election day, most often taking his young children with him to the voting location to benefit from the educational experience of voting in person.
12. Plaintiff Scott Romano is a Colorado resident who currently lives in Littleton. He registered to vote after August 26, 2016 when he turned 18. Plaintiff Romano eagerly anticipates voting in his first eligible election since turning 18. Mr. Romano intends to

vote by mail prior to the general election on November 8, 2016 as well as future Colorado primary and general elections.

13. Plaintiff Colin Phipps is a Colorado resident who currently lives in Denver. He registered to vote in September, 2016 and turned 18 at the end of 2015. Plaintiff Phipps eagerly anticipates voting in his first eligible election since turning 18. Mr. Phipps intends to vote by mail prior to the general election on November 8, 2016 as well as intending to vote in future Colorado primary and general elections.

14. Defendant Wayne Williams is the Secretary of State of Colorado and maintains an office in Denver, Colorado. Secretary Williams has the power to enforce provisions of the election code, C.R.S. § 1-1-107, including the provision in question in the election code, C.R.S. § 1-13-712. He is sued in his official capacity.

15. Defendant Cynthia Coffman is the Attorney General of Colorado and maintains an office in Denver, Colorado. Attorney General Coffman holds “equal power with district attorneys to file and prosecute informations or complaints against any persons for violating any of the provisions of [the Colorado Elections] code.” C.R.S. § 1-13-101(2). This statewide jurisdiction includes Littleton and Colorado Springs. She is sued in her official capacity.

16. Defendant Mitchell R. Morrissey is the Denver District Attorney in Colorado and maintains an office in Denver, Colorado. District Attorney Morrissey holds “equal power” with the attorney general “to file and prosecute informations or complaints against any persons for violating any of the provisions of [the Colorado Elections] code.” C.R.S. § 1-13-101(2). District Attorney Morrissey’s jurisdiction includes, at a minimum, Denver. He is sued in his official capacity.

STATEMENT OF FACTS

17. Plaintiffs own and usually carry cell phones that are capable of capturing digital photographs and uploading such files to social media accounts.
18. Plaintiffs currently maintain social media accounts on Facebook, Twitter, Instagram and Snapchat, respectively, to each of which they frequently upload photographs for display to connections and the public at large, including occasional selfies.
19. Plaintiff Owen Hill would engage in ballot selfie activity in future elections in polling places, but is prohibited from doing so under Colorado law pursuant to interpretations from the Denver District Attorney and Defendant Secretary of State.
20. Plaintiff Owen Hill maintains a public profile on Facebook and uses this profile to communicate with constituents and other interested members of the public. Plaintiff Hill desires to post a photograph of his voted ballot on his public Facebook profile, as well as other social media accounts.
21. Plaintiff Owen Hill believes posting a photograph of his voted ballot is a unique way of expressing his political views that cannot be adequately replaced by using mere words to speak a similar message.
22. Plaintiff Owen Hill would, if not prohibited by law, take a selfie of his voted ballot (a photograph) in the voting place for sharing shortly after voting on social media outside the polling place.
23. Plaintiff Scott Romano, voting for the first time in this election, would, if not prohibited by law, engage in ballot selfie activity in this upcoming election and future elections for mail-in voting, but is prohibited from doing so under the same law pursuant to the interpretation of the Denver District Attorney and Defendant Secretary of State.

24. Plaintiff Scott Romano believes posting a photograph of his voted ballot is a unique way of expressing his political views that cannot be adequately replaced by using mere words to speak a similar message.

25. Plaintiff Colin Phipps, voting for the first time in this election, would, if not prohibited by law engage in ballot selfie activity in this upcoming election and future elections for mail-in voting, but is prohibited from doing so under the same law pursuant to the interpretation of the Denver District Attorney and Defendant Secretary of State.

26. Plaintiff Colin Phipps believes posting a photograph of his voted ballot is a unique way of expressing his political views that cannot be adequately replaced by using mere words to speak a similar message.

27. In pertinent part, the Colorado Elections Code states that

(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.

(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 (emphasis added). This punishes violators with up to a year imprisonment, a \$1,000 fine, or both. See C.R.S. § 1-13-111.

28. Upon information and belief, there has never been a documented case of ballot photography in Colorado being used to facilitate vote buying or vote fraud.

29. This provision, pursuant to recent interpretations, subjects Plaintiffs to fines and imprisonment if they take a ballot selfie in a polling place or of their own marked mail-in ballots.

FIRST CLAIM FOR RELIEF

COLO. REV. STAT. § 1-13-712(1) Violates the First Amendment

30. The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.” U.S. CONST. amend. I.

31. State laws and regulations must respect the First Amendment, pursuant to the Fourteenth Amendment. U.S. CONST. amend. XIV; *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959).

32. Electoral advocacy is a key purpose of the First Amendment. “[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. ... [including] discussions of candidates” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

33. “The protections afforded by the First Amendment ... have never been limited to newspapers and books. ... Moreover, many untraditional forms of expression are also

protected by the First Amendment.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (internal citations omitted).

34. C.R.S. § 1-13-712(1) is a content-based prohibition, penalizing electors such as the Plaintiffs for “show[ing] [their] ballot[s] after [they are] prepared” while allowing for other subjects of speech within and outside of polling places. *See Burson v. Freeman*, 504 U.S. 191, 196 (1992).

35. Content-based speech prohibitions are subject to strict scrutiny. *Pahls v. Thomas*, 718 F.3d 1210, 1229 (10th Cir. 2013).

36. Whatever interests the State of Colorado might have relating to the integrity of the electoral process such as preventing election fraud and voter intimidation, they can be secured in a more reasonable manner than the prohibition in C.R.S. § 1-13-712(1). Because this law runs roughshod and bans photography of one’s own ballot and visual disclosure of a one’s own ballot far beyond a polling place without serving any governmental interest, it cannot be said to be properly tailored. *See also Rideout*, 2016 WL 5403593 (overturning a ballot photography ban even under intermediate scrutiny).

37. C.R.S. § 1-13-712(1) deprives individuals of the First Amendment right to express themselves freely—and unquestionably truthfully—regarding candidates for whom they have voted by imposing overbroad bans. Because this law is an unequivocal ban untailored to any compelling governmental interest, it must be declared unconstitutional and enjoined.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for the following relief:

1. A declaratory judgment that C.R.S. § 1-13-712(1) is unconstitutional.
2. Preliminary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 against enforcement of C.R.S. § 1-13-712(1).

3. Plaintiffs' reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988, or any applicable statute or authority, and further relief this Court may grant in its discretion.
4. Any other relief that the Court deems just and appropriate.

Respectfully submitted,

/s/ Michael Francisco

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Dated this 31st day of October, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, the foregoing Motion for a Forthwith Hearing on Plaintiffs' 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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