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**BUT FIRST, (DON'T) LET ME TAKE A SELFIE:
NEW HAMPSHIRE'S BAN ON BALLOT SELFIES
AND FIRST AMENDMENT SCRUTINY**

Emily Wagman*

INTRODUCTION

With the 2016 election fast approaching, millions of Americans will be stepping into voting booths across the country, many for the first time. What better way for people to commemorate a first-time voting experience than by taking photos of their ballots? What harm could there be in that? Though one of the bedrock principles of American democracy is the First Amendment, which protects the freedom of speech,¹ and though the Supreme Court has, time and time again, recognized the importance of political speech in particular,² there are limits to what the First Amendment covers.³ For instance, Congress and states can both limit the amount of money individuals can contribute to political campaigns, and states can protect polling places from undue influence by prohibiting campaigning within a specified perimeter of voting booths.⁴

Undue influence in elections has been a concern in the United States since the country's inception and its first elections, and states have instituted a variety of measures to combat electoral corruption and coercion of voters, including the secret ballot.⁵ In 2014, New Hampshire amended RSA 659:35, I,⁶ its law preventing voters from showing their ballots to others with the intent to disclose how they plan to vote, to include a prohibition on taking photos of their marked ballots and sharing

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¹ U.S. CONST. amend. I.

² *See* *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”). *See generally* *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

³ *See, e.g.,* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that speech of a nature used to create a “clear and present danger” is not protected speech under the First Amendment).

⁴ *See, e.g.,* *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that a Tennessee law “requiring solicitors to stand 100 feet from the entrances of polling places” was constitutional).

⁵ *See generally* Jill Lepore, *Rock Paper Scissors*, *NEW YORKER* (Oct. 13, 2008), <http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> [<http://perma.cc/XZ8Z-TC52>] (discussing the history of vote buying, voter coercion, and the adoption of the Australian ballot in the United States).

⁶ N.H. REV. STAT. ANN. § 659:35, I (2016).

them on social media.⁷ Other states, including Indiana, have prohibited so-called ballot selfies as well.⁸ States prohibiting ballot selfies cite interests in preventing vote buying and voter coercion,⁹ but are these kinds of photographs actually protected political speech under the First Amendment?

In August 2015, the U.S. District Court for the District of New Hampshire held that New Hampshire's ban on ballot selfies was unconstitutional in *Rideout v. Gardner*.¹⁰ This was the first time a court had addressed this type of law, and it is likely that similar litigation will follow in states with similar prohibitions, using the New Hampshire decision as persuasive authority. However, did the New Hampshire court get it wrong?

The State pursued a litigation strategy that ultimately addressed the requirements of strict scrutiny.¹¹ For a law to survive strict scrutiny analysis, it must further a "compelling governmental interest," and the law must be "narrowly tailored . . . to achieve that interest."¹² The court held that RSA 659:35, I did not withstand strict scrutiny analysis for reasons that will be addressed later in this Note.¹³ However, laws with similar aims have survived strict scrutiny in the past,¹⁴ and, subjected to similar analysis, New Hampshire's law should have withstood the same level of scrutiny and been upheld.

This Note is split into five parts. Part I will provide a historical background regarding vote buying and voter coercion in the United States, introduce *Rideout v. Gardner*—New Hampshire's ballot selfie case—and provide an analysis of *Reed v. Town of Gilbert*¹⁵—the case that changed the way courts address content-neutral and content-based legislation.¹⁶ Part II will provide an in-depth analysis of the *Rideout* court's application of strict scrutiny before showing that New Hampshire's law could actually survive strict scrutiny.¹⁷ Parts III, IV, and V will evaluate other methods of scrutiny and analysis that New Hampshire's prohibition on ballot selfies would successfully withstand, including *O'Brien* scrutiny, expressive conduct scrutiny, and the exacting scrutiny utilized in the campaign finances cases.¹⁸

⁷ *Rideout v. Gardner*, 123 F. Supp. 3d 218, 221 (D.N.H. 2015).

⁸ Erik Eckholm, *Selfies in Voting Booths Raise Legal Questions on Speech and Secrecy*, N.Y. TIMES (Aug. 24, 2015), http://www.nytimes.com/2015/08/25/us/selfies-in-voting-booths-raise-legal-questions-on-speech-and-secrecy.html?_r=0.

⁹ *See id.*

¹⁰ *See* 123 F. Supp. 3d 218, 235 (D.N.H. 2015).

¹¹ *See infra* text accompanying notes 99–107.

¹² *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [<http://perma.cc/M26K-CZ65>].

¹³ *See infra* Part I.C.

¹⁴ *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that a law "requiring solicitors to stand 100 feet from the entrances to polling places" survives strict scrutiny).

¹⁵ 135 S. Ct. 2218 (2015).

¹⁶ *See infra* Part I.

¹⁷ *See infra* Part II.

¹⁸ *See infra* Parts III, IV, and V.

I. VOTE BUYING, *RIDEOUT V. GARDNER*, AND *REED V. TOWN OF GILBERT*:
THE INTERSECTION OF AMERICAN HISTORY AND THE JUDICIARY

A. *An American History of Vote Buying and Voter Coercion*

At first glance, vote buying and voter coercion seem like antiquated concepts that could never occur in the twenty-first century. However, the United States has a history of vote buying and voter coercion that started close to the time of the Founding Fathers and has continued through recent elections in the first two decades of the twenty-first century.¹⁹ With this sweeping history of vote buying and voter coercion in mind, the state of New Hampshire decided to amend RSA 659:35, I in an effort to prevent both problems.²⁰

The United States' history of vote buying and voter coercion began long before the Australian or secret ballot was introduced to American elections in the late nineteenth century.²¹ The new American colonists voted out loud.²² It was not until 1634 that a gubernatorial candidate in Massachusetts was elected using a paper ballot.²³ Because the time, place, and manner of elections is left to the states,²⁴ every state handled elections differently in the early days of the American Republic.²⁵ Eventually, most states moved toward using a paper ballot, but many did not provide the ballots themselves—voters had to bring their own paper and write out the names of their preferred candidates by hand.²⁶ Pre-printed ballots were an innovation of the late eighteenth century—some partisan voters began bringing them to the polls, and handed them out with money to voters: “Doling out cash—the money came to be called ‘soap’—wasn’t illegal; it was getting out the vote.”²⁷

The early nineteenth century saw the innovation of “party tickets” that each major political party printed out for their voters.²⁸ The ballots were sent to voters in advance and they would have to bring them to the polls on election day.²⁹ These party tickets resulted in all sorts of “fraud and intimidation,” with the ballots becoming so big and colorful that it was easy to tell which slate of candidates voters

¹⁹ See *infra* text accompanying notes 20–27.

²⁰ See *Rideout v. Gardner*, 123 F. Supp. 3d 218, 221–22 (D.N.H. 2015) (discussing the legislative history of the amendment to RSA 659:35, I).

²¹ Lepore, *supra* note 5.

²² *Id.*

²³ *Id.*

²⁴ U.S. CONST. art. I, § 4, cl. 1.

²⁵ Lepore, *supra* note 5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

were planning on casting their votes for.³⁰ Ultimately, the instances of voter “fraud and intimidation” became so commonplace that people wanted a change in the way they cast their votes.³¹ Various states attempted to make election day more of a secret, but many proposed measures failed, because there was a strong feeling that there was no reason for people to be afraid to publicly announce their votes.³²

Ultimately, it was not until the end of the nineteenth century that each state, led first by New York, adopted the secret, or Australian, ballot.³³ The secret ballot was championed by Henry George, an eventual failed mayoral candidate, after he saw how corrupt American elections had become.³⁴ In San Francisco, for instance, party leaders gave out coins worth \$2.50 to voters, while in Indiana, voters sold their votes for “a sandwich, a swig, and a fiver.”³⁵ Perhaps the most egregious instance of electoral corruption came out of New York, where Boss Tweed’s voters managed to cast over fifty thousand illegal votes in 1868.³⁶ With widespread voter fraud occurring in many states, it did not take very long for every state to shift to the Australian ballot.³⁷ Problem solved? Not quite.

³⁰ *Id.*

³¹ *See id.* (explaining that voters began to want to hide their votes).

³² *See id.* (“[In 1831] Maine required that all ballots be printed on the same color paper, to protect voters trying to cast minority ballots in a polling place besieged by rowdy members of the majority. It didn’t do much good. What honest man was ashamed of his vote? . . . In 1851, a Massachusetts legislature dominated by Free Soilers and Democrats mandated the use of envelopes, to be supplied by the Secretary of State. That didn’t do much good, either . . . By the time the House Committee on Elections investigated the contested 1859 Baltimore congressional election, jostling and brawling at the polls were to be expected and endured.”).

³³ *Id.* Lepore’s article goes somewhat in depth into the history of the secret ballot in Australia and the United Kingdom. *See id.* Though not entirely relevant to the issue of voter coercion in the United States, the international history of the secret ballot plays a role in how the United States views voting today. *See id.* The United States was not the first country outside of Australia to implement the secret ballot electoral system. *Id.* James Mill advocated for the secret ballot in Scotland in 1830, in an effort to keep the votes of tenants and factory workers safe from the dangers of coercion by landlords and factory owners, respectively. *Id.* Australia passed an election law with relevant ballot clauses in 1856 that required polling places to be designed for voters to cast secret ballots. *Id.* Three years after Australia passed its secret ballot legislation, James Mill’s son, John Stuart Mill, argued against the secret ballot, making the claim that, interestingly, voting is not a right, but is rather a trust that implicates the public interest and should not be secret at all. *See id.* Mill was ultimately outvoted, with his opponents making the point that only the secret ballot can protect the less powerful from being taken advantage of by the more powerful—the electorate is full of people from different statures and walks of life. *See id.* Parliament adopted the secret ballot in 1872. *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See id.* (discussing how New York was the last state to switch to the Australian ballot in 1890).

Throughout the twentieth century, some states grappled with vote buying and voter coercion even after the introduction of the secret ballot.³⁸ In Arkansas, for example, voters exchanged their votes for money and whiskey well into the 1970s.³⁹ Not only were voters bribed but many began voting well before they were of legal voting age.⁴⁰ Retired Arkansas Supreme Court Justice Tom Glaze writes that he became acquainted with Searcy County's election fraud after the 1976 election.⁴¹ Rex Elliot, a member of the Searcy County Republican Committee, admitted to Justice Glaze that candidates on both sides of the aisle would often raise upwards of \$20,000 to pay voters.⁴² "Rex estimated that a third of the votes in a typical general election were bought[]" by members of the Republican and Democratic parties.⁴³ Not only were the candidates involved but, allegedly, both parties had a collection of judges and clerks involved in the vote buying scheme.⁴⁴

Ultimately, Glaze filed a federal lawsuit, with eighty-eight residents of Searcy County serving as plaintiffs.⁴⁵ His trial did not go as planned, though, because one of the attorneys for the defendants and others involved in the scheme had advised everyone to use their Fifth Amendment right against self-incrimination.⁴⁶ While Justice Glaze's trial did not actually come to fruition, it led to changes in how the citizens of Searcy County voted.⁴⁷ Justice Glaze's story ends, though, with a disquieting thought: "The people of Searcy County got reasonably honest elections in 1976 and 1978 and they were happy about it, but I would not warrant that votes were never sold again."⁴⁸

Justice Glaze's prediction that votes were sold again after the 1976 elections came true in multiple states.⁴⁹ In *United States v. Shatley*,⁵⁰ "[d]uring the election campaign before the November 2002 general election in Caldwell County, North Carolina, Wayne Shatley and four others engaged in a widespread scheme to buy votes for the Republican candidate for sheriff, Gary Clark."⁵¹ Shatley organized and financed

³⁸ See *infra* text accompanying notes 39–63.

³⁹ Tom Glaze, *The Day the Vote-Buying Stopped*, ARK. TIMES (June 29, 2011), <http://www.arktimes.com/arkansas/the-day-the-vote-buying-stopped/Content?oid=1837617> [<http://perma.cc/Y354-8DWZ>].

⁴⁰ See *id.* (discussing how election judges permitted anyone who showed up to the polls to cast a vote).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *id.* (describing the decree that resulted from Judge Glaze's lawsuit and the conduct it proscribed).

⁴⁸ *Id.*

⁴⁹ See *infra* text accompanying notes 50–58.

⁵⁰ 448 F.3d 264 (4th Cir. 2006).

⁵¹ *Id.* at 266.

the scheme with his own money, using somewhere between \$5,000 and \$6,000 to pay voters approximately \$25 a piece for voting for his preferred candidate.⁵²

In *United States v. Thomas*,⁵³ “[t]he defendants in this case—four Democratic precinct committeemen in East St. Louis, Illinois—were convicted” of engaging in a vote-buying scheme in the 2004 election.⁵⁴ The defendants were all heard discussing paying voters between \$5 and \$10 to vote for Democratic candidates,⁵⁵ and a witness testified that she saw one of the defendants personally paying voters on election day.⁵⁶

In *United States v. Johnson*,⁵⁷ Naomi Johnson and another defendant, Earl Young, were indicted for conspiracy to buy votes and vote buying.⁵⁸ At their trial, the Government presented evidence that during early voting for the May 2010 primary, more absentee votes than usual were cast on one particular day in Breathitt County, Kentucky.⁵⁹ The owner of Salyers’ Grocery Store testified that vote buying was a common occurrence in Breathitt—people would offer to sell their votes to him because he was allegedly buying.⁶⁰ What the facts did not elaborate on, however, is how the voters provided proof to Salyers and the defendants of how they voted. Was it an honor system? Or did the voters have to have tangible proof? Because this instance of vote buying occurred in 2010, it is likely that many of the voters had the means to take photos of their marked ballots as proof, almost like a receipt.

In 1965, Congress passed 52 U.S.C. § 10307, which addresses prohibited acts.⁶¹ Subsection (b) of § 10307 states:

Intimidation, threats, or coercion. No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate,

⁵² *Id.*

⁵³ 510 F.3d 714 (7th Cir. 2007).

⁵⁴ *Id.* at 716.

⁵⁵ *Id.* at 719.

⁵⁶ *Id.* at 720.

⁵⁷ No. 5:11-CR-143, 2012 U.S. Dist. LEXIS 117777 (E.D. Ky. Aug. 21, 2012).

⁵⁸ *Id.* at *1.

⁵⁹ *Id.* at *2.

⁶⁰ *Id.* The Breathitt County vote buying scheme worked as follows: some voters would go to Salyers’ store and offer to sell their votes, while others would have their votes solicited in exchange for money. *Id.* at *2–3. Once the arrangements were made, Salyers would have someone bring the voter to the polls. *Id.* at *3. After the person voted, Salyers would pay him or her somewhere between \$20 and \$25 for voting a certain way. *Id.*

⁶¹ 52 U.S.C. § 10307 (2016).

threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title⁶²

At the state level, New Hampshire has comparable legislation that prohibits vote buying and voter coercion,⁶³ but are federal and state laws prohibiting vote buying and voter coercion enough to prevent people from engaging in these sorts of schemes? The evidence from Arkansas, North Carolina, Kentucky, and Illinois suggests that these laws might not be enough.⁶⁴ With concerns of vote buying and voter coercion in mind, the New Hampshire legislature passed its statutory ban on voters taking photos of their marked ballots and putting them on social media.⁶⁵

B. *Rideout v. Gardner—Facts of the Case*

In 2014, the New Hampshire State Legislature amended RSA 659:35, I to add the prohibition on ballot selfies.⁶⁶ The amended statute reads:

No voter shall allow his or her ballot to be seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has voted except as provided in RSA 659:20. This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means.⁶⁷

The legislative history of the amendment noted only one actual alleged instance of vote buying in New Hampshire: Representative Till stated that

⁶² § 10307(b).

⁶³ See N.H. REV. STAT. ANN. §§ 659:37–40, III (2016).

⁶⁴ See *supra* text accompanying notes 37–58.

⁶⁵ See *Rideout v. Gardner*, 123 F. Supp. 3d 218, 221–23 (D.N.H. 2015).

⁶⁶ See *id.* at 221.

⁶⁷ N.H. REV. STAT. ANN. § 659:35, I (2016), *invalidated* by *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015). The code section mentioned in RSA 659:35, I, 659:20, reads:

Any voter who declares to the moderator under oath that said voter needs assistance marking his or her ballot shall, upon the voter's choice and request after the moderator has informed the voter of the accessible voting options that are available at the polling place, receive the assistance of one or both of the inspectors of election . . . or of a person of the voter's choice provided that the person is not the voter's employer or union official.

§ 659:20.

[she] was told by a Goffstown resident that he knew for a fact that one of the major parties paid students from St[.] Anselm's \$50 to vote in the 2012 election. [She didn't] know whether that [was] true or not, but [she did] know that if [she] were going to pay someone to vote a particular way, [she] would want proof that they actually voted that way.⁶⁸

After the New Hampshire legislature enacted the prohibition, the New Hampshire Attorney General's Office investigated four people for violating RSA 659:35, I.⁶⁹ Three of the four investigated individuals became the plaintiffs in this case.⁷⁰ Leon Rideout, a member of the New Hampshire House of Representatives (R-Coos County), took a photo of his marked ballot that showed that he voted for himself and other Republican candidates.⁷¹ He then posted the photo on Twitter, and on his Facebook page, to make a statement that he believed RSA 659:35, I was unconstitutional.⁷² Andrew Langlois took a photo of his ballot after writing in the name of his deceased dog, Akira.⁷³ He posted the photo to Facebook with the caption: "Because all of the candidates SUCK, I did a write-in of Akira"⁷⁴ Brandon Ross, a candidate for the New Hampshire House of Representatives, voted for himself in Manchester, and took a photo of his ballot to mark the occasion.⁷⁵ Because he was aware of the prohibition on posting ballot selfies, he waited to post it.⁷⁶ When Ross heard that other voters were being investigated under RSA 659:35, I he posted the photo on Facebook with the caption: "Come at me, bro."⁷⁷

The three plaintiffs challenged the part of RSA 659:35, I that prohibits taking photos of marked ballots and disclosing them.⁷⁸ They argued that posting their ballot selfies was "an important and effective means of political expression . . . protected by the First Amendment."⁷⁹ Secretary Gardner, on the other hand, argued that the law was necessary "to prevent vote buying and voter coercion."⁸⁰

⁶⁸ *Rideout*, 123 F. Supp. 3d at 224 (quoting Exhibit G to the Declaration of Gilles Bissonnette, Esquire in Support of Plaintiffs' Motion for Summary Judgment at 000064, *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015) (No. 14-cv-489-PB)).

⁶⁹ *Id.* at 226.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* (quoting David Brooks, *You Didn't Take a Picture of Your Ballot Tuesday, Did You? (It's Illegal)*, TELEGRAPH (Sept. 11, 2014), <http://www.nashuatelegraph.com/news/1046026-469/you-didnt-take-a-picture-of-your.html> [<http://perma.cc/JK9H-EG5V>]).

⁷³ *Id.* at 226–27.

⁷⁴ *Id.* at 227.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 228 (internal quotation marks omitted).

⁷⁹ *Id.*

⁸⁰ *Id.*

Even though New Hampshire only had the one alleged instance of vote buying, Part I of this Note shows that there is a history of vote buying and voter coercion in the United States with cases occurring into the twenty-first century.⁸¹ With that historical background likely motivating the New Hampshire State Legislature, it should have followed that the District Court would have upheld RSA 659:35, I using rational basis scrutiny, because the prohibition looked content-neutral on its face.⁸²

However, the U.S. Supreme Court decision in *Reed v. Town of Gilbert* expanded the definition of content-based restrictions, which expanded the kinds of statutes subject to strict scrutiny analysis.⁸³

1. *Reed v. Town of Gilbert*—The Supreme Court's Update on Content-Based Restrictions

Reed v. Town of Gilbert came about when Good News Community Church (Church) and its pastor, Clyde Reed, wanted to advertise their church services.⁸⁴ The Church placed between fifteen and twenty signs around Gilbert on Saturdays, and removed them after services on Sundays.⁸⁵ Gilbert, however, had a sign code that prohibited the display of outdoor signs in the town without a permit, but exempted several categories of signs from that requirement, including ideological signs, political signs, and temporary directional signs for a qualifying event.⁸⁶ Qualifying events included any “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.”⁸⁷ Gilbert cited the Church twice for placing signs around town that did not fall into the exempted categories, and the Church filed a claim in federal court arguing that Gilbert had violated its freedom of speech.⁸⁸ When the case made it to the United States Supreme Court, the majority expanded the definition of content-based restrictions.⁸⁹ Prior to this case, “[t]he court used to say laws were content-based if they were adopted to suppress speech with which the government disagreed.”⁹⁰ Justice Thomas, however, stated that “[g]overnment

⁸¹ See *supra* text accompanying notes 19–60.

⁸² *Rational Basis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis [<http://perma.cc/ZP2U-BCUQ>].

⁸³ *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

⁸⁴ *Id.* at 2225.

⁸⁵ *Id.*

⁸⁶ *Id.* at 2224–25.

⁸⁷ *Id.* at 2225.

⁸⁸ *Id.* at 2225–26.

⁸⁹ *Id.* at 2227.

⁹⁰ Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html>.

regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”⁹¹ The ultimate effect of the majority opinion in *Reed*, wrote Judge Easterbrook, was to “abolish[] any distinction between content regulation and subject-matter regulation.”⁹²

C. *Reed v. Town of Gilbert’s Impact on Rideout v. Gardner*

Prior to *Reed*, it is likely that the district court would have applied the intermediate scrutiny analysis used for content-neutral restrictions on speech, since RSA 659:35, I regulated photos of marked ballots in general, not the content of those ballots.⁹³ Had the district court used intermediate scrutiny, it would have analyzed RSA 659:35, I to determine whether the statute furthered an important governmental interest in a way that was substantially related to that interest.⁹⁴ As long as the law was narrowly tailored to serve a significant interest and left open alternative means of communication, it would have survived intermediate scrutiny.⁹⁵

The district court’s opinion references *Reed* in finding that the law at issue in New Hampshire was content-based:

In the present case, as in *Reed*, the law under review is content based on its face because it restricts speech on the basis of its subject matter. The only . . . photographic images that are barred by RSA 659:35, I are images of marked ballots that are intended to disclose how a voter has voted. . . . Accordingly, like the sign code at issue in *Reed*, the law under review here is subject to strict scrutiny⁹⁶

In short, because RSA 659:35, I regulated what kind of photo could be posted on social media, it was a content-based regulation.⁹⁷ For a law to survive strict scrutiny, it must further a compelling governmental interest and be narrowly tailored.⁹⁸

⁹¹ *Reed*, 135 S. Ct. at 2227.

⁹² Liptak, *supra* note 90 (quoting *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015)).

⁹³ See N.H. REV. STAT. ANN. § 659:35, I (containing the language of the statute). Phrased another way, had RSA 659:35, I regulated which photos of marked ballots were allowed to be posted on social media (i.e., only photos of write-in ballots), that would have been a content-based regulation.

⁹⁴ *Intermediate Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [<http://perma.cc/PLN7-3TVU>].

⁹⁵ *Strict Scrutiny*, *supra* note 12.

⁹⁶ *Rideout v. Gardner*, 123 F. Supp. 3d 218, 229 (D.N.H. 2015).

⁹⁷ *Id.*

⁹⁸ *Id.* at 231.

New Hampshire tried various means of persuading the court to use a lower level of scrutiny, but all of its proposed arguments ultimately failed.⁹⁹ Secretary Gardner first tried to argue that RSA 659:35, I was only a “partial ban” on speech, since it did not entirely prevent voters from letting others know how they voted.¹⁰⁰ Following Secretary Gardner’s argument¹⁰¹ to its logical conclusion, because the state left open other means of communication, RSA 659:35, I should have been subject to intermediate scrutiny rather than strict scrutiny. The district court, however cited the U.S. Supreme Court in noting that “[t]he distinction between laws burdening and laws banning speech is but a matter of degree. The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.”¹⁰²

Secretary Gardner also made the argument that RSA 659:35, I was not content-based because 659:35, II prevents voters from putting any sort of identifying mark on their ballots, and that because there were two separate bans relating to marked ballots in the code section, it was content-neutral.¹⁰³ The court noted, however, that the two sections of 659:35 regulate two different kinds of speech—speech outside the polling place and speech inside the polling place.¹⁰⁴

Finally, Secretary Gardner argued that marked ballots are actually government speech, citing *Walker v. Texas Division, Sons of Confederate Veterans*.¹⁰⁵ In *Walker*, the Supreme Court held that license plates are government speech for three reasons: “(1) license plates ‘long have communicated messages from the States,’ (2) Texas license plate designs ‘are often closely identified in the public mind with the State,’ and (3) Texas maintains direct control over the messages conveyed on its specialty plates.”¹⁰⁶ Although this was a creative argument, it failed in court because “ballots do not communicate messages from the state[,] . . . there is no possibility that a voter’s marking on a ballot will be misinterpreted as state speech[,] . . . [and] New Hampshire does not maintain direct control over the messages that people convey on ballots”¹⁰⁷ So, RSA 659:35, I could not be considered government speech.

Though the court recognized that New Hampshire’s interest in preventing vote buying and voter coercion were “compelling in the abstract,”¹⁰⁸ the state did not show that there was an actual problem addressed by the statutory ban on ballot selfies.¹⁰⁹ The one anecdotal piece of evidence of vote buying offered in the legislative history of RSA 659:35, I was not enough to prove that New Hampshire has a

⁹⁹ See *infra* notes 100–07 and accompanying text.

¹⁰⁰ *Rideout*, 123 F. Supp. 3d at 229.

¹⁰¹ *Id.* at 229–30.

¹⁰² *Id.* at 230 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000)).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing 135 S. Ct. 2239 (2015)).

¹⁰⁶ *Id.* (quoting *Walker*, 135 S. Ct. at 2248–49).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 231.

¹⁰⁹ *Id.* (citing *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011)).

current problem with vote buying and voter coercion.¹¹⁰ The plaintiffs, on the other hand, presented evidence that there had been no recorded cases or prosecutions of vote buying and voter coercion since 1976.¹¹¹ The historical showing of vote buying and voter coercion throughout the United States was not enough to show that New Hampshire itself has, or ever had, a problem with either of its stated interests.¹¹²

Moreover, RSA 659:35, I was not narrowly tailored.¹¹³ In the strict scrutiny of content-based regulations, “the burden is on the state to demonstrate that the restriction it has adopted is the ‘least restrictive means’ available to achieve the stated objective.”¹¹⁴ The amended RSA 659:35, I was not narrowly tailored because it was likely to punish people who were not participating in vote buying or voter coercion.¹¹⁵ The plaintiffs in this case, for instance, placed photos of their marked ballots on social media to make a point—they were not engaged in vote-buying schemes.¹¹⁶ Thus, because RSA 659:35, I did not further a sufficiently compelling interest and was not narrowly tailored, it could not survive strict scrutiny, and the court held that the statutory prohibition on ballot selfies was unconstitutional under the First Amendment.¹¹⁷

II. SURVIVING STRICT SCRUTINY

A. *Burson v. Freeman*

As *Rideout v. Gardner* shows, strict scrutiny is often fatal. However, laws meant to protect the electoral process can, and do, survive strict scrutiny.¹¹⁸ In *Burson v. Freeman*,¹¹⁹ Freeman, the treasurer for a campaign, filed suit claiming that Tennessee Code § 2-7-111(b), which provides that campaigners cannot solicit votes or display campaign materials within 100 feet of the entrance to a polling place,¹²⁰ violated the First and Fourteenth Amendments.¹²¹ Though the Davidson County Chancery Court dismissed Freeman’s suit,¹²² the Tennessee Supreme Court held that Tennessee had

¹¹⁰ *Id.* at 232.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 233.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 234 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

¹¹⁶ See *supra* notes 70–76 and accompanying text.

¹¹⁷ *Rideout*, 123 F. Supp. 3d at 235.

¹¹⁸ See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding a law that required solicitors to stand at least 100 feet from polling places).

¹¹⁹ 504 U.S. 191 (1992)

¹²⁰ TENN. CODE ANN. § 2-7-111(b) (1972).

¹²¹ *Burson*, 504 U.S. at 193.

¹²² *Id.* at 194.

a compelling interest in preventing these activities within polling places, but not outside them.¹²³ The U.S. Supreme Court reversed the Tennessee State Supreme Court's decision and upheld Tennessee's restriction on campaigning within 100 feet of a polling place.¹²⁴

Because Tennessee's law was a content-based restriction on political speech, it was subject to strict scrutiny.¹²⁵ The State argued two compelling interests: "its regulation serve[d] its compelling interest in protecting the right of its citizens to vote freely for the candidates of their choice[,]""¹²⁶ and "its restriction protect[ed] the right to vote in an election conducted with integrity and reliability."¹²⁷ Citing *Reynolds v. Sims*,¹²⁸ the Court recognized that the first interest was compelling: "the 'right to vote freely for the candidate of one's choice is of the essence of a democratic society.'"¹²⁹ Citing *Anderson v. Celebrezze*,¹³⁰ the Court also held that there is a recognized compelling interest in making sure that the right to vote is not "undermined by fraud in the election process."¹³¹

The Court noted that it is not enough for a state to have compelling interests; Tennessee had to demonstrate that its regulation was necessary to further its interests.¹³² After looking at the history of voter intimidation and election fraud, both in Tennessee and the United States as a whole, the Court held that Tennessee's interests were furthered by the campaign-free zone at issue.¹³³ The Court pointed to the fact that Tennessee's original 1897 Act regulating the electoral process "made it a misdemeanor to commit various election offenses, including the use of bribery, violence, or intimidation in order to induce a person to vote or refrain from voting for any particular person or measure."¹³⁴ Ultimately, this sounds familiar—bribery to induce a person to vote is essentially vote buying.

Perhaps most important is the Court's narrow tailoring analysis of Tennessee's law.¹³⁵ Freeman argued that the 100-foot boundary proscribed by the law was not narrowly tailored to properly achieve Tennessee's stated interests,¹³⁶ but the Court disagreed:

¹²³ *Id.* at 195.

¹²⁴ *Id.* at 211.

¹²⁵ *Id.* at 207.

¹²⁶ *Id.* at 198.

¹²⁷ *Id.* at 199.

¹²⁸ 377 U.S. 533 (1964).

¹²⁹ *Burson*, 504 U.S. at 199 (quoting *Reynolds*, 377 U.S. at 555).

¹³⁰ 460 U.S. 780 (1983).

¹³¹ *Burson*, 504 U.S. at 199.

¹³² *Id.*

¹³³ *Id.* at 206.

¹³⁴ *Id.* at 205.

¹³⁵ *Id.* at 199–211.

¹³⁶ *Id.* at 208.

[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State ‘to the burden of demonstrating empirically the objective effects on political stability that [are] produced’ by the voting regulation in question. . . . Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud ‘would necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action. Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights.’¹³⁷

Tennessee’s 100-foot campaign-free zone ultimately withstood the second part of the strict scrutiny analysis, especially because any change in size would just be a change in degree rather than a less restrictive alternative.¹³⁸

Ultimately, the Court recognized that *Burson v. Freeman* was one of those rare cases where a state’s regulation can withstand strict scrutiny.¹³⁹ Though the First Amendment conflicted with the campaign-free zone, “[a] long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect [the right to cast a ballot in an election free from the taint of intimidation and fraud].”¹⁴⁰

B. Compelling Governmental Interests

Although the *Rideout* court made an effort to distinguish *Burson* from *Rideout*,¹⁴¹ the two cases have more similarities than differences. The court noted that the amended RSA 659:35, I is extremely new, and as such cannot be connected to recent instances of voter fraud.¹⁴² In contrast, Tennessee’s law was just one of many state laws that had been enacted to prevent voter coercion and fraud, so it was acceptable and right for Tennessee to act without evidence of current voter fraud and intimidation.¹⁴³ However, it is difficult to draw a bright line between Tennessee’s regulation and New Hampshire’s as they both attempt to further extremely similar governmental

¹³⁷ *Id.* at 208–09 (second alteration in original) (quoting *Munroe v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

¹³⁸ *Id.* at 210.

¹³⁹ *Id.* at 211.

¹⁴⁰ *Id.*

¹⁴¹ *Rideout v. Gardner*, 123 F. Supp. 3d 218, 233 (D.N.H. 2015).

¹⁴² *Id.*

¹⁴³ *Id.* (discussing the Court’s holding in *Burson v. Freeman*).

objectives.¹⁴⁴ Ultimately, preventing vote buying and voter coercion and protecting the right of voters to freely vote for the candidate of their choice in an election “conducted with integrity and reliability”¹⁴⁵ are two sides of the same coin. If voters feel that there is the possibility of vote buying and voter coercion, they are likely to feel that the election is not being conducted with integrity and reliability. Moreover, a financial incentive to vote a certain way might mean that a voter is not truly free to vote for the candidate of his or her choice.

Further, New Hampshire’s interests are compelling in reality, as well as in the abstract, despite the lack of concrete evidence of fraud. In *Crawford v. Marion County Election Board*,¹⁴⁶ the U.S. Supreme Court held that Indiana’s interest in preventing in-person voter impersonation was valid, even though there was no evidence of that type of voter fraud occurring in Indiana’s history.¹⁴⁷ Although that was the case, “[i]t remains true . . . that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists [and] that occasional examples have surfaced in recent years”¹⁴⁸ This suggests that “the risk of voter fraud [is] real [and] that it could affect the outcome of a close election.”¹⁴⁹ The *Crawford* Court did not use strict scrutiny to analyze Indiana’s voter ID law.¹⁵⁰ However, the fact that the Court held that Indiana’s interest in preventing voter fraud was legitimate and important without concrete evidence of voter fraud actually occurring shows that New Hampshire’s interests in preventing vote buying and voter coercion should be compelling in reality, and not just in the abstract.

Moreover, there were no recorded instances of vote buying and voter coercion after New Hampshire amended RSA 659:35, I showing that the law was actually working.¹⁵¹ The court’s analysis is reminiscent of Justice Ginsburg’s dissent in *Shelby County v. Holder*.¹⁵² Ginsburg argued that sections 4 and 5 of the Voting Rights Act were still necessary to prevent racial discrimination in the voting process.¹⁵³ “Ginsburg said that getting rid of this part of the act while it appeared to be effective in stopping

¹⁴⁴ Compare *id.* at 231 (purported state interests were “perverting vote buying and voter coercion”), with *Burson*, 504 U.S. at 198–99 (purported state interests were protecting the right of citizens to vote freely and conducting elections with “integrity and reliability”).

¹⁴⁵ *Burson*, 504 U.S. at 199.

¹⁴⁶ 553 U.S. 181 (2008).

¹⁴⁷ *Id.* at 194, 196.

¹⁴⁸ *Id.* at 195.

¹⁴⁹ *Id.* at 196.

¹⁵⁰ *Id.* at 191.

¹⁵¹ See Richard L. Hasen, *Why the Selfie Is a Threat to Democracy*, REUTERS (Aug. 18, 2015), <http://blogs.reuters.com/great-debate/2015/08/17/why-the-selfie-is-a-threat-to-democracy/> [<http://perma.cc/LZW4-EFZY>] (discussing New Hampshire’s ballot selfie law and drawing comparisons between the analysis in *Reed v. Gilbert*, 135 S. Ct. 2218 (2015) and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)).

¹⁵² *Id.* (discussing Justice Ginsburg’s dissent in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)).

¹⁵³ *Shelby Cty.*, 133 S. Ct. at 2632–33 (Ginsburg, J., dissenting).

racial discrimination ‘is like throwing away your umbrella in a rainstorm because you are not getting wet.’”¹⁵⁴

New Hampshire’s prohibition on posting ballot selfies on social media did coincide with a lack of prosecutions in New Hampshire for vote buying.¹⁵⁵ In contrast, there are other states that still prosecute individuals for participating in vote-buying schemes.¹⁵⁶ This shows that New Hampshire’s interest in preventing vote buying and voter coercion is not only compelling in the abstract, but in reality as well. Ultimately, RSA 659:35, I, clearly worked.

C. Narrow Tailoring

For New Hampshire’s statutory prohibition on ballot selfies to survive strict scrutiny, not only do the government’s interests have to be compelling, but the regulation has to be narrowly tailored as well.¹⁵⁷ The crucial section of *Burson v. Freeman* for New Hampshire’s success in defending RSA 659:35, I comes in the Court’s discussion of narrow tailoring, as cited above.¹⁵⁸ The *Burson* Court references *Munro v. Socialist Workers Party*¹⁵⁹ in its analysis of Tennessee’s campaign-free zone.¹⁶⁰ *Munro* held that the State of Washington had the right to require candidates to receive at least one percent of the vote in the primary before the candidate could be listed on the ballot for the general election.¹⁶¹

The portion of *Munro* that the *Burson* Court cites is actually tailored nicely to New Hampshire’s legislation.¹⁶² Given that legislatures should be allowed to respond proactively, rather than reactively, to possible problems with the electoral process, New Hampshire’s statutory prohibition on posting ballot selfies to social media is the sort of “corrective action”¹⁶³ that both the *Munro* Court and the *Burson* Court had in mind when upholding Washington’s and Tennessee’s election restrictions—both of which also implicated the First Amendment.¹⁶⁴

In their Memorandum of Law in Support of Their Motion for Summary Judgment, the plaintiffs in *Rideout v. Gardner* argued that the amended RSA 659:35, I was not narrowly tailored, but rather was overly broad, because it restricted constitutionally

¹⁵⁴ Hasen, *supra* note 151 (quoting *Shelby Cty.*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting)).

¹⁵⁵ *Rideout v. Gardner*, 123 F. Supp. 3d 218, 224 (D.N.H. 2015) (explaining that there has been no evidenced instance of vote buying in New Hampshire since the late nineteenth century).

¹⁵⁶ See *supra* notes 39–62 and accompanying text.

¹⁵⁷ *Rideout*, 123 F. Supp. 3d at 231 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015)).

¹⁵⁸ See *supra* text accompanying notes 132–37.

¹⁵⁹ 479 U.S. 189 (1986).

¹⁶⁰ *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992) (citing *Munro*, 479 U.S. at 195).

¹⁶¹ *Munro*, 479 U.S. at 190.

¹⁶² *Burson*, 504 U.S. at 208–09 (citing *id.* at 195).

¹⁶³ *Munro*, 479 U.S. at 195.

¹⁶⁴ See *Burson*, 504 U.S. 191; *Munro*, 479 U.S. 189.

protected political speech.¹⁶⁵ As amended, RSA 659:35, I prohibited speech: “(i) far beyond the polling place, (ii) indefinitely after the date of the election, and (iii) without any nexus to vote corruption”¹⁶⁶ because of the statute’s direct application to online speech.¹⁶⁷ However, there is nothing in New Hampshire’s law that prevents a voter from posting a status update on Facebook saying that she voted for Hillary Clinton, or a voter from posting a tweet on Twitter saying “I voted! #feelthebern.”¹⁶⁸ So, there are endless alternative means of announcing how someone votes on social media, but there is only one way of providing proof of one’s vote to a vote buyer. It follows that New Hampshire’s law is as narrowly tailored as it has to be to prevent vote-buying schemes and voter coercion from occurring.

Ultimately, New Hampshire’s statutory prohibition on posting ballot selfies online, like Tennessee’s 100-foot campaign-free zone, might not have been perfectly tailored to handle its interests in preventing voter coercion and vote buying.¹⁶⁹ But that’s just fine. With the advent of the secret ballot, it became almost impossible to prove how a voter voted on election day. Gone were the days of the massive, brightly colored party tickets and the days of being able to actually watch someone vote. Instead, vote buyers and sellers had to turn to different means of proving how the sellers voted so they could get paid. Though the recent cases of vote buying rely more on verbal and recorded audio evidence,¹⁷⁰ it is not hard to imagine a scenario where someone would be able to use a photo of his or her ballot as proof that he or she voted a certain way.

In sum, RSA 659:35, I should be able to withstand strict scrutiny under an analysis similar to that used in *Burson v. Freeman. Munro, Burson*, and *Crawford v. Marion County Election Board* all provide support for the idea that a state does not need to have concrete evidence of something like vote buying and voter coercion occurring recently to want to proactively handle future threats to its electoral system.¹⁷¹ Professor Richard Hasen lends support to this analysis as well in drawing the connection between *Rideout* and *Shelby County*.¹⁷² As Doug Chapin, the director of the University of Minnesota’s program for excellence in election administration so succinctly stated: “[B]allot selfies create a vulnerability in the election process that vastly outweighs any societal or personal benefit the selfie brings Perhaps

¹⁶⁵ Plaintiffs’ Memorandum of Law in Support of Their Motion for Summary Judgment at 3, *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015) (No. 1:14-cv-00489-PB).

¹⁶⁶ *Id.* at 35.

¹⁶⁷ *Id.* at 37.

¹⁶⁸ N.H. REV. STAT. ANN. § 659:35, I (2016).

¹⁶⁹ *Burson*, 504 U.S. at 209–11.

¹⁷⁰ *See supra* notes 39–60 and accompanying text.

¹⁷¹ *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 181–82 (2008); *Burson*, 504 U.S. at 191–92; *Munro v. Socialist Workers Party*, 479 U.S. 189, 189 (1986).

¹⁷² *See Hasen, supra* note 151 (discussing Justice Ginsburg’s distaste for eradicating a law because there is no current evidence of the harm the law seeks to prevent).

that’s generational, but I think it’s something worth thinking—and worrying—about going forward.”¹⁷³

Even though New Hampshire’s statutory prohibition on posting ballot selfies on social media should withstand strict scrutiny, it is important to analyze it under other levels of scrutiny as well, especially because a ballot selfie is an example of speech that can be analyzed under the *O’Brien* intermediate scrutiny test.¹⁷⁴ Further, the political speech implicated in ballot selfies lends itself well to a comparison with another form of political speech—campaign contributions. The next three sections will deal with *O’Brien* scrutiny, expressive conduct’s intermediate level scrutiny, and the exacting scrutiny analysis called for in *Buckley v. Valeo*.¹⁷⁵

III. BALLOT SELFIES UNDER *O’BRIEN*

Framing RSA 659:35, I as a law regulating a combination of speech and nonspeech elements would lead to the use of a lower level of scrutiny.¹⁷⁶ Filling out a ballot, taking a photo of it, and posting it on social media is a combination of speech and nonspeech elements, similar to the draft card burning at issue in *United States v. O’Brien*.¹⁷⁷ In *O’Brien*, the defendant was convicted for setting his draft card on fire in violation of the 1965 amendment to the Universal Military Training and Service Act of 1948, which prohibited the destruction of draft cards.¹⁷⁸ He argued that the prohibition on the destruction of draft cards was unconstitutional because it violated his First Amendment freedom of speech.¹⁷⁹ The Court upheld the prohibition on the destruction of draft cards using a specific intermediate scrutiny test for acts involving a combination of speech and nonspeech elements.¹⁸⁰

While *O’Brien* argued that the 1965 Amendment was unconstitutional because it impeded his protected symbolic speech,¹⁸¹ the Court noted that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”¹⁸² With that in mind, the Court went on to hold that

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important

¹⁷³ Eckholm, *supra* note 8.

¹⁷⁴ *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

¹⁷⁵ 424 U.S. 1 (1976) (per curiam); *see infra* Parts III, IV, V.A.

¹⁷⁶ *See O’Brien*, 391 U.S. at 376.

¹⁷⁷ 319 U.S. 367, 369, 372 (1968) (describing the facts of the case).

¹⁷⁸ *Id.* at 369–70.

¹⁷⁹ *Id.* at 376.

¹⁸⁰ *Id.* at 377.

¹⁸¹ *Id.* at 376.

¹⁸² *Id.*

or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁸³

Under this test, the federal prohibition on the destruction of draft cards was constitutional,¹⁸⁴ and New Hampshire's ban on posting ballot selfies to social media would likely be constitutional as well.

As in *O'Brien*, New Hampshire's ban on posting ballot selfies to social media implicates both speech and nonspeech elements.¹⁸⁵ The act of posting the photo itself is arguably nonspeech, while any sort of caption explaining why the poster voted the way he or she did is more like actual speech. Under the *O'Brien* test, New Hampshire's prohibition on ballot selfies would survive and ultimately be upheld.¹⁸⁶

The first part of the test, whether the regulation is within the constitutional power of the government,¹⁸⁷ is easily satisfied. All states, including New Hampshire, have the power under the U.S. Constitution to regulate the time, place, and manner of elections,¹⁸⁸ and preventing the posting of ballot selfies falls comfortably within that state power.

The second part of the *O'Brien* test, whether the regulation furthers a substantial or important governmental interest,¹⁸⁹ is satisfied by New Hampshire as well. The state's interest in preventing vote buying and voter coercion is certainly both substantial and important, especially since the U.S. Supreme Court identified preventing voter intimidation as a compelling state interest in *Burson v. Freeman*.¹⁹⁰ If an interest is compelling, then it is clearly substantial and important as well. New Hampshire would likely have an easier time making an *O'Brien* claim because the District Court was unsympathetic to the idea that preventing vote buying and voter coercion were compelling interests in reality, and not just in the abstract.¹⁹¹ Because New Hampshire does not have a recent, localized history of vote buying and voter coercion,¹⁹² it would be easier for the state to argue that its interests are either substantial or important.

¹⁸³ *Id.* at 377.

¹⁸⁴ *Id.* at 386.

¹⁸⁵ *See, e.g.,* Rideout v. Gardner, 123 F. Supp. 3d 218, 226 (D.N.H. 2015) (discussing plaintiff Rideout's conduct of posting a photo of his ballot to Twitter—which is arguably nonspeech—and including a textual caption—which is clearly speech).

¹⁸⁶ *See infra* notes 187–203 and accompanying text.

¹⁸⁷ *O'Brien*, 391 U.S. at 377.

¹⁸⁸ U.S. CONST. art. I, § 4, cl. 1.

¹⁸⁹ *O'Brien*, 391 U.S. at 377.

¹⁹⁰ 504 U.S. 191, 199 (1992).

¹⁹¹ Rideout v. Gardner, 123 F. Supp. 3d 218, 232–33 (D.N.H. 2015).

¹⁹² *Id.*

The third and fourth parts of the *O'Brien* test, whether “the governmental interest is unrelated to the suppression of free expression”¹⁹³ and whether “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of th[at] [government’s] interest,”¹⁹⁴ would also be satisfied by New Hampshire. In *O'Brien*, the government’s interest in protecting the Selective Service System was unrelated to the suppression of free expression because *O'Brien* was prosecuted based on the nonspeech element of his conduct—the burning of the draft card itself—and not the meaning behind why he chose to publicly burn it as a protest against the Vietnam War.¹⁹⁵ Further, *O'Brien* had alternative means of protesting the Vietnam War that were not impacted by the government’s interest in keeping the Selective Service System running smoothly, so any restriction of his First Amendment right to free speech was not overly broad.¹⁹⁶

New Hampshire’s prohibition on posting ballot selfies is somewhat more complicated than *O'Brien* because two of the plaintiffs had been prosecuted for posting photos of their marked ballots in protest of New Hampshire’s law.¹⁹⁷ However, it is still the case that New Hampshire’s interest in preventing voters from posting photos of their marked ballots on social media is unrelated to the suppression of free expression because the state is trying to prevent vote buying and voter coercion. Here, the state would have the strongest argument against the plaintiff who voted for his recently deceased dog because his reasons for posting the photo on social media were to protest the perceived lack of good candidates, not to protest the law itself.¹⁹⁸

Ultimately, though, all three plaintiffs, like *O'Brien*, were prosecuted for the nonspeech element of New Hampshire’s law because they posted the photos of their marked ballots to Facebook.¹⁹⁹ The state was not concerned with *why* the plaintiffs posted the photos, just that they did, which implicates the nonspeech, rather than the speech, element of the course of conduct.

New Hampshire’s restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the government’s interest²⁰⁰ because it leaves open a variety of alternative channels for voters to discuss how and why they voted a certain way. There is nothing in New Hampshire’s law that stops voters from posting Facebook statuses about why they chose to vote the way they did, or from speaking privately with friends and family about how they voted.²⁰¹ All New Hampshire’s law

¹⁹³ *O'Brien*, 391 U.S. at 377.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 382.

¹⁹⁶ *See id.* (describing the purpose of the 1965 Amendment and explaining that *O'Brien* was condemned only for his non-communicative acts).

¹⁹⁷ *Rideout*, 123 F. Supp. 3d at 226–27.

¹⁹⁸ *See id.* at 227 (describing the photograph the plaintiff posted to Facebook and the caption that accompanied the picture).

¹⁹⁹ *Id.* at 226–27.

²⁰⁰ *See O'Brien*, 391 U.S. at 377 (laying out the *O'Brien* factors).

²⁰¹ *See supra* text accompanying note 65.

prevents is posting photos of filled-out ballots on social media,²⁰² so there are a variety of alternative methods of discussing why a voter chose to vote the way he or she did.

In sum, under the *O'Brien* test for courses of conduct that have both speech and nonspeech elements, like the conduct New Hampshire banned in its prohibition on ballot selfies, RSA 659:35, I would survive the type of intermediate scrutiny used by the U.S. Supreme Court in *O'Brien*.²⁰³

IV. EXPRESSIVE ACTS

The U.S. Supreme Court has defined an expressive act as one with the intent to convey a particularized message where there is a high likelihood that, in context, the message will be understood by an audience.²⁰⁴ If speech is expressive, then the government has to show a compelling interest to limit the speech.²⁰⁵ The Court explicitly addressed the issue of expressive conduct in *Spence v. Washington*.²⁰⁶ In *Spence*, the defendant/appellant was convicted under Washington's improper use statute²⁰⁷ after being arrested for hanging a U.S. flag upside down, with a peace sign fashioned from black adhesive tape attached to both the front and back of the flag.²⁰⁸ Spence hung the flag in his window as a protest against United States action in Cambodia and the Kent State shooting.²⁰⁹

The U.S. Supreme Court held that Spence's conduct was protected expression under the First Amendment because Spence had an intent to convey a particularized message, a protest of the invasion of Cambodia and the Kent State shooting, and because it was likely, given the context, that the message would be understood by an audience.²¹⁰ The Court found that there was no state interest strong enough to overcome the First Amendment protection and therefore, reversed Spence's conviction.²¹¹

²⁰² N.H. REV. STAT. ANN. § 659:35, I (2016).

²⁰³ See *O'Brien*, 391 U.S. at 376; see *supra* text accompanying notes 182–200.

²⁰⁴ *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam).

²⁰⁵ See *id.* at 413–14 n.8.

²⁰⁶ 418 U.S. 405, 409–10 (1974).

²⁰⁷ See WASH. REV. CODE § 9.86.020 (2016) (“No person shall, in any manner, for exhibition or display: (a) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or (b) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted, or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . .”).

²⁰⁸ *Spence*, 418 U.S. at 406.

²⁰⁹ *Id.* at 408.

²¹⁰ *Id.* at 410–11.

²¹¹ *Id.* at 413–15.

In New Hampshire, really only one of the three plaintiffs' actions, Andrew Langlois, the voter who wrote in the name of his dog,²¹² would likely qualify as expressive speech without the caption on the photo. He voted for his dog because he did not like any of the candidates on the ballot,²¹³ and it is likely that the audience, his Facebook friends, who saw a photo of his marked ballot would understand his message. Once his conduct would qualify as expressive, New Hampshire would have to show a compelling interest to limit the speech under RSA 659:3d, I.²¹⁴ As stated previously, the District Court erred in holding that New Hampshire did not have a compelling interest in prohibiting the posting of ballot selfies, given the robust American history of vote buying and voter coercion, both of which still occur,²¹⁵ and the precedent set by *Burson v. Freeman*.²¹⁶

For the other two plaintiffs, both candidates who voted for themselves, the expressive speech test might fail on its own. Although both plaintiffs had the intent to convey a particularized message, protest of New Hampshire's law, it is unclear given the facts on the record that it would have been sufficiently likely that their message of protest would have been understood by their audience. This is especially true for plaintiff Brandon Ross because his caption of "[c]ome at me, bro"²¹⁷ is just cryptic enough for a member of his Facebook audience to be unsure of why he posted the photo of his ballot with that particular caption. Though the expressive speech test set forth in *Spence* would not work by itself for Leon Rideout and Ross, both of their actions would still fall under the *O'Brien* test, allowing the state of New Hampshire's prohibition on posting ballot selfies on social media to stand.²¹⁸

V. BALLOT SELFIES AND CAMPAIGN CONTRIBUTIONS

A. *Buckley v. Valeo and Exacting Scrutiny*

Although the *O'Brien* test is a means for New Hampshire to avoid the need for strict scrutiny under the U.S. Supreme Court's new definition of content-based speech set forth in *Reed v. Town of Gilbert*,²¹⁹ the possibility still exists for the U.S.

²¹² Rideout v. Gardner, 123 F. Supp. 3d 218, 226–27 (D.N.H. 2015).

²¹³ *Id.* at 227.

²¹⁴ *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (“[T]he government may regulate the time, place, and manner of . . . expressive activity, so long as such restrictions are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.”).

²¹⁵ *See supra* text accompanying notes 19–60.

²¹⁶ 504 U.S. at 199.

²¹⁷ *Rideout*, 123 F. Supp. 3d at 227.

²¹⁸ *See United States v. O'Brien*, 291 U.S. 367, 376–77 (1968) (explaining that the *O'Brien* test is appropriate when speech and nonspeech elements are present).

²¹⁹ *See* 135 S. Ct. 2218, 2227 (2015) (defining content based regulations as a regulation that “applies to particular speech because of the topic discussed or the idea or message expressed”).

Supreme Court to clarify its shift from the old definition of content-based and content-neutral restrictions. Were the Court to make this kind of clarification, given the intent of the New Hampshire legislature in amending RSA 659:35, I,²²⁰ the law could be analyzed using the exacting scrutiny test used in *Buckley v. Valeo*.²²¹ *Buckley* was the first major campaign finance case, and it set the standard the U.S. Supreme Court has used to evaluate campaign finance legislation—the threat of quid pro quo corruption or the appearance thereof.²²²

After the Watergate scandal, Congress passed the Federal Election Campaign Act Amendments (FECA) of 1974.²²³ FECA set limits on contributions to federal candidates and political parties, as well as limits on independent expenditures and candidate expenditures.²²⁴ All of the contribution and expenditure limits were challenged in *Buckley v. Valeo*, and the Court ultimately upheld the contribution limits but found that the expenditure limits were unconstitutional.²²⁵

In upholding the contribution limits, the *Buckley* Court recognized that “[e]ven a ‘significant interference’ with protected rights of political association’ may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”²²⁶ The Court ultimately held that there is a sufficiently important governmental interest in preventing quid pro quo corruption and the appearance thereof in setting contribution limits, because allowing unlimited contributions might lead to some sort of favorable response from the candidate.²²⁷ Even though contribution limits lead to some chilling of First Amendment political speech, the interest in preventing quid pro quo corruption justifies the chilling effect.²²⁸

The primary purpose of the FECA, and the constitutionally sufficient justification of preventing quid pro quo corruption,²²⁹ is similar to New Hampshire’s interest in wanting to prohibit the posting of photos of marked ballots on social media—voter coercion and vote buying and quid pro quo corruption are ultimately two sides of the same coin. The worry with quid pro quo corruption is that a candidate is getting paid by a voter in an effort to advance the voter’s preferred policy objectives.²³⁰ The

²²⁰ *Rideout*, 123 F. Supp. 3d at 222.

²²¹ 424 U.S. 1, 25 (1976) (per curiam).

²²² *Id.* at 25.

²²³ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, 26, and 47 U.S.C.).

²²⁴ *Federal Law*, CAMPAIGN FIN. INST., <http://www.cfinst.org/law/federal.aspx> [<http://perma.cc/58UD-7AC7>].

²²⁵ *Buckley*, 424 U.S. at 143.

²²⁶ *Id.* at 25.

²²⁷ *Id.* at 26–27.

²²⁸ *Id.* at 27.

²²⁹ *See id.* at 26–27; *supra* note 224.

²³⁰ *See Buckley*, 424 U.S. at 227–28.

worry with voter coercion and vote buying is similar—the candidate is paying the voter to vote for him or her in an effort to win the election. Either way, money exchanges hands in the interest of electing a certain candidate, so regulations of both contributions and voter coercion and vote buying should be scrutinized similarly.

B. “Novelty and Plausibility”

The Court has used the interest in preventing quid pro quo corruption and the appearance thereof time and time again to uphold contribution limits. Other U.S. Supreme Court cases lend credence to the idea that quid pro quo corruption and vote buying and voter coercion are more similar than they are different.²³¹ In *Nixon v. Shrink Missouri Government PAC*,²³² the U.S. Supreme Court upheld Missouri’s contribution limits, extending *Buckley* to apply to state, as well as federal laws.²³³ The *Shrink Missouri* Court applied the *Buckley* test, checking to see if Missouri’s law was a “means ‘closely drawn’ to match a ‘sufficiently important interest’”²³⁴ The *Shrink Missouri* Court went on to quote *United States v. Mississippi Generating Co.*²³⁵ in saying that “[d]emocracy works ‘only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.’”²³⁶ This applies to the problems of vote buying and voter coercion as well—even if very few voters participate in vote-buying schemes, the fact that there are “suspicions of malfeasance and corruption”²³⁷ surrounding those schemes that would be implicated when voters begin posting photos of their marked ballots online should be enough to survive a test similar to *Buckley*’s “closely drawn”²³⁸ standard.²³⁹

Additionally, the *Shrink Missouri* Court noted that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary . . . with the novelty and plausibility of the justification raised”²⁴⁰ and that “the State presented an affidavit from . . . the co-chair of the state legislature’s Interim Joint Committee on Campaign Finance Reform . . . who stated that large contributions

²³¹ See *infra* notes 232–58 and accompanying text (discussing how wealthy individuals attempt to use their money to “influence governmental action”).

²³² 528 U.S. 377 (2000).

²³³ *Id.* at 381–82.

²³⁴ *Id.* at 378 (quoting *Buckley*, 424 U.S. at 25).

²³⁵ *United States v. Miss. Valley Generating Co.*, 364 U.S. 520 (1961).

²³⁶ *Shrink Mo. Gov’t PAC*, 528 U.S. at 390 (quoting *Miss. Valley Generating Co.*, 364 U.S. at 562).

²³⁷ *Id.*

²³⁸ *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam).

²³⁹ See *id.* (describing the “closely drawn” standard).

²⁴⁰ *Shrink Mo. Gov’t PAC*, 528 U.S. at 391.

have ‘the real potential to buy votes’²⁴¹ This is ultimately a similar scenario to the circumstances in New Hampshire when RSA 659:35, I was amended.²⁴²

The “novelty and plausibility”²⁴³ of vote buying and voter coercion in New Hampshire is something worth considering. Because New Hampshire does not have its own history of vote buying and voter coercion through the sorts of vote-buying schemes seen in other states,²⁴⁴ but because there is a robust history of vote buying and voter coercion in the United States²⁴⁵ the lack of novelty of the issue indicates that the amount of empirical evidence might not need to be as much as the District Court thought was necessary in *Rideout v. Gardner*.²⁴⁶ Further, the fact that vote-buying schemes still occur throughout the country indicates that the plausibility of it happening in New Hampshire is high as well. The affidavit from the co-chair of the state legislature’s Interim Joint Committee on Campaign Finance Reform is, admittedly, more substantial than the legislative history surrounding the amended RSA 659:35, I,²⁴⁷ but, ultimately, the recognition that “large contributions have ‘the real potential to buy votes,’”²⁴⁸ and the anecdotal evidence that there was a vote-buying scheme in a recent New Hampshire election²⁴⁹ are similar in that they both recognize a problem that can be resolved through state legislative action.

Even in *McCutcheon v. FEC*,²⁵⁰ the case that eliminated the aggregate contribution limit,²⁵¹ the Court recognized that there was

no need . . . to revisit *Buckley*’s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review. *Buckley* held that the Government’s interest in preventing *quid pro quo* corruption or its appearance was “sufficiently important . . .”; we have elsewhere stated that the same interest may be properly labeled “compelling,” . . . so that the interest would satisfy even strict scrutiny.²⁵²

²⁴¹ *Id.* at 393 (quoting *Shrink Mo. Gov’t Pac v. Adams*, 5 F. Supp. 2d 734, 738 (1998)).

²⁴² *See Rideout v. Gardner*, 123 F. Supp. 3d 218, 223–24 (D.N.H. 2015) (describing the vote-buying circumstances in New Hampshire’s history).

²⁴³ *Shrink Mo. Gov’t PAC*, 528 U.S. at 391.

²⁴⁴ *See, e.g.*, *United States v. Thomas*, 510 F.3d 714, 717 (7th Cir. 2007); *United States v. Shatley*, 448 F.3d 264, 265 (4th Cir. 2006); *United States v. Johnson*, No. 5:11-CR-143, 2012 U.S. Dist. LEXIS 117777, at *1–5 (E.D. Ky. Aug. 21, 2012) (discussing vote-buying schemes in various states).

²⁴⁵ *See supra* text accompanying notes 19–60.

²⁴⁶ 123 F. Supp. 3d at 235.

²⁴⁷ *Id.* at 224.

²⁴⁸ *Shrink Mo. Gov’t PAC*, 528 U.S. at 393.

²⁴⁹ *Rideout*, 123 F. Supp. 3d at 224.

²⁵⁰ 134 S. Ct. 1434 (2014) (plurality opinion).

²⁵¹ *Id.* at 1436–37.

²⁵² *Id.* at 1445 (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985); *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam)).

The “elsewhere” that the Court is referring to is *FEC v. National Conservative Political Action Committee*.²⁵³ In this case, the U.S. Supreme Court used the “compelling governmental interests” language in evaluating whether independent expenditures by political committees were constitutional.²⁵⁴ Though the Court was looking at expenditures rather than contributions, the use of “compelling governmental interests” and “narrowly tailored” in the Court’s analysis shows that there is a compelling interest to be found in preventing quid pro quo corruption,²⁵⁵ which further suggests that an appropriately tailored statute addressing contributions (rather than expenditures) could survive strict scrutiny. This indicates, in turn, that it should be possible for New Hampshire’s prohibition on posting ballot selfies to social media to withstand the kind of scrutiny that is applied to campaign contributions.

The *McCutcheon* Court went on to note that regardless of whether the Court applies strict scrutiny or the “closely drawn” *Buckley* test, “[they] must assess the fit between the stated governmental objective and the means selected to achieve that objective. Or to put it another way, if a law that restricts political speech does not ‘avoid unnecessary abridgment’ of First Amendment rights, it cannot survive ‘rigorous’ review.”²⁵⁶ In extending this logic to New Hampshire’s prohibition on posting ballot selfies to social media, the same test would apply. New Hampshire’s RSA 659:35, I is able to “avoid unnecessary abridgment”²⁵⁷ of First Amendment rights by leaving open ample alternative avenues of speech regarding one’s actions at the voting booth. It is only meant to address and prevent the potential of people posting evidence publicly of how they voted in an effort to prevent vote-buying schemes from coming to fruition. Without the sort of proof or receipt that a ballot selfie provides, it would be impossible to be certain of how a voter actually voted, which makes an effective vote-buying scheme nearly impossible to enact. Because that is all that New Hampshire’s prohibition on ballot selfies is meant to achieve, there is no better way for the state to prevent the “proof of purchase” necessary for effective vote-buying schemes, which means that although there is some abridgment of voters’ First Amendment rights, it is not unnecessary, which would allow RSA 659:35, I to survive the sort of rigorous scrutiny used for campaign finance legislation.²⁵⁸

In sum, should the U.S. Supreme Court clarify its change in the definitions of content-neutral and content-based speech, there would be an entirely different means for analyzing New Hampshire’s prohibition on posting ballot selfies to social media. This is because there is a strong similarity between the governmental interests in

²⁵³ 470 U.S. 480.

²⁵⁴ *Id.* at 496–97.

²⁵⁵ *McCutcheon*, 134 S. Ct. at 1438.

²⁵⁶ *Id.* at 1445–46 (quoting *Buckley*, 424 U.S. at 25).

²⁵⁷ *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam).

²⁵⁸ *See McCutcheon*, 134 S. Ct. at 1446 (laying out the “unnecessary abridgment” standard that prevents a statute from passing “rigorous review”).

preventing vote buying and voter coercion and the interests in preventing quid pro quo corruption implicated in the campaign finance cases. From *Buckley*'s "closely drawn" standard²⁵⁹ and the "compelling governmental interests" and "narrowly tailored" language used in *McCutcheon*²⁶⁰ and *National Conservative Political Action Committee*,²⁶¹ to the "novelty and plausibility" language used in *Shrink Missouri Government PAC*,²⁶² New Hampshire's prohibition on ballot selfies fits in comfortably to the Supreme Court's analysis of capping campaign contributions.²⁶³ This good fit is partially because quid pro quo corruption and vote buying and voter coercion are ultimately not that different.

CONCLUSION

This Note addressed a variety of litigation strategies that would lead a court to uphold RSA 659:35, I and allow New Hampshire to continue prohibiting the posting of ballot selfies on social media, including a more accurate strict scrutiny analysis,²⁶⁴ the *O'Brien* test,²⁶⁵ the expressive speech test,²⁶⁶ and the exacting scrutiny analysis used in campaign finance cases.²⁶⁷ While the First Circuit evaluated the statute using intermediate scrutiny,²⁶⁸ analyzing the law using the *O'Brien* test, the expressive speech test, and the exacting scrutiny used in the campaign finance cases still provide alternative means of framing RSA 659:35, I.²⁶⁹ The best approach, given the current state of content-based and content-neutral analysis, is strict scrutiny, but New Hampshire should be able to successfully argue that its prohibition on ballot selfies can withstand strict scrutiny. With the 2016 presidential election fast approaching, this will be the first time voters will enter the voting booths with the knowledge that they can, in fact, take photos of their marked ballots, so it is worth considering the consequences that this might have on the electoral process.

The district court's decision to overturn the prohibition on ballot selfies and allow voters to post photos of their marked ballots on social media is likely to have some sort of consequence on how people perceive the electoral process in New Hampshire.²⁷⁰ In voter ID cases, for instance, states have successfully argued that

²⁵⁹ *Buckley*, 424 U.S. at 25.

²⁶⁰ *McCutcheon*, 134 S. Ct. at 1445.

²⁶¹ *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985).

²⁶² *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000).

²⁶³ *See supra* notes 223–62 and accompanying text.

²⁶⁴ *See supra* Part II.

²⁶⁵ *See supra* Part III.

²⁶⁶ *See supra* Part IV.

²⁶⁷ *See supra* Part V.

²⁶⁸ *See supra* Part III.

²⁶⁹ *See supra* Parts IV, V.

²⁷⁰ *See* Dave Solomon, *Judge Strikes Down NH Ballot Selfie Ban*, N.H. UNION LEADER (Aug. 11, 2015, 9:10 AM), <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20150811>

voter ID laws help promote confidence in the electoral system by preventing voter fraud.²⁷¹ Similarly, an explosion of ballot selfies would likely lead to a decrease in voter confidence and an increase in fears of vote buying and voter coercion.

Social media is extremely pervasive today, and most (if not all) campaigns, both at the federal and the state level, have some sort of presence on platforms like Facebook and Twitter.²⁷² Though both services provide a form of public communications, they each also have their own means of privately or directly messaging an account.²⁷³ RSA 659:35, I provides that voters cannot take “a digital image or photograph of his or her marked ballot and [distribute or share] the image via social media or by any other means.”²⁷⁴ All three plaintiffs in *Rideout v. Gardner* posted their photos publicly on Facebook, and the district court opinion only contemplated the kind of public postings displayed by the plaintiffs.²⁷⁵ However, there would really be no way to know if voters are directly or privately messaging photos of their marked ballots to campaign officials in exchange for money. With the use of a service like PayPal,²⁷⁶ the entire exchange could be kept completely secret, only known to the campaign officials running the vote-buying scheme and the voters they convinced to participate.

With these very real concerns in mind, New Hampshire’s interest in preventing vote buying and voter coercion becomes very real, and is no longer the kind of interest in the abstract that the district court held was not compelling enough to allow the statute to survive strict scrutiny.²⁷⁷ Though there is no evidence that this sort of vote-buying scheme has been orchestrated in New Hampshire yet, a clear

/NEWS06/150819784 [http://perma.cc/8EYU-WWC5] (discussing the repercussions of the district court’s decision to overturn the “ballot selfie” ban).

²⁷¹ See generally *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202–03 (2008) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434, 439 (1992)).

²⁷² See, e.g., Hillary Clinton, FACEBOOK, <http://www.facebook.com/hillaryclinton> [http://perma.cc/GB5W-4D89]; Donald Trump, FACEBOOK, <http://www.facebook.com/DonaldTrump> [http://perma.cc/4LTS-FHEF]; Bernie Sanders (@SenSanders), TWITTER, <http://www.twitter.com/BernieSanders> [http://perma.cc/N6GM-PHGW]; Ted Cruz (@tedcruz), TWITTER, <http://www.twitter.com/tedcruz> [http://perma.cc/U3UC-VJ8N].

²⁷³ See *How Do I Send a Private Message to a Page?*, FACEBOOK, <https://www.facebook.com/help/142031279233975> [http://perma.cc/VTK5-S4A5]; *Let’s Speak Privately*, TWITTER, <https://about.twitter.com/messages> [http://perma.cc/3TN8-2YGT].

²⁷⁴ N.H. REV. STAT. ANN. § 659:35, I (2016).

²⁷⁵ See 123 F. Supp. 3d 218, 226–27 (D.N.H. 2015) (describing each plaintiff’s conduct in connection with their “ballot selfie”).

²⁷⁶ See Steven Swinford, *Ebay and Paypal Users Face Huge Tax Crackdown*, TELEGRAPH (July 24, 2015, 7:30 AM), <http://www.telegraph.co.uk/tax/income-tax/ebay-and-paypal-users-face-huge-tax-crackdown/> [http://perma.cc/GLG4-KQYE]. PayPal is an online electronic payment provider that enables people and businesses to pay for goods and services online. *Id.* Government concern about PayPal is that the government has no way to track what people buy. *Id.*

²⁷⁷ See *Rideout*, 123 F. Supp. 3d. at 232 (reviewing the district court’s language in rejecting the government’s asserted interest).

example of how it would occur, combined with the argument that vote buying and voter coercion would cause a decrease in confidence in the electoral system, should be enough of a concrete compelling interest for the state.

A clear example of how this kind of vote-buying scheme would occur would also resolve any concerns regarding the overly broad nature of the statute. Although the plaintiffs successfully argued that RSA 659:35, I was overly broad because it encapsulated what should be protected political speech,²⁷⁸ interpreting the statute's language on social media to include private and direct messaging rebuts the presumption that the state was trying to limit protected speech under the First Amendment.

While this was not addressed on appeal, had New Hampshire been able to show that it is possible for campaigns to engage in vote-buying schemes on social media, it might have been enough for the First Circuit to reverse the district court's decision and reinstate the prohibition on posting ballot selfies.²⁷⁹ This kind of strategy worked for the voter ID law in Indiana where there were no documented instances of in-person voter fraud.²⁸⁰ Because the state was able to show that in-person voter fraud has occurred historically, with occasional instances occurring more recently, the U.S. Supreme Court upheld the law.²⁸¹

As evidenced earlier in this Note, there is a long history of voter coercion and vote buying in the United States, as well as examples of vote-buying schemes occurring well into the twenty-first century.²⁸² The most recent prosecuted case of vote buying occurred in 2010, two years after President Obama's incredibly successful social media campaign.²⁸³ After President Obama's social media campaign was so successful, other candidates, on both the local and the federal level, have emulated his strategy.²⁸⁴ All of the major (and many minor) candidates in the 2016 presidential race, for instance, have an active Facebook and Twitter presence,²⁸⁵ which provides a myriad of opportunities for engaging with voters both publicly and privately. And because New Hampshire is a crucial state during both the primary and the general elections, it is possible that the state could be on the forefront of entirely electronic vote-buying schemes. Because this is a very real concern, New

²⁷⁸ *Id.* at 234.

²⁷⁹ *See* *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (stating that individuals have a right to vote freely and states have a "compelling interest" in ensuring voters can vote freely).

²⁸⁰ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194–95 (2008).

²⁸¹ *Id.* at 204.

²⁸² *See supra* Part I.A.

²⁸³ *See generally* David Carr, *How Obama Tapped into Social Networks' Power*, N.Y. TIMES (Nov. 9, 2008), http://www.nytimes.com/2008/11/10/business/media/10carr.html?_r=1 (detailing President Obama's efforts to use social media to advance his political platform).

²⁸⁴ *See supra* note 272; *see also* Summer Concepcion, *Who Wins the Social Media Mayor's Race?*, NBC CHI. (Apr. 6, 2015, 2:38 PM), <http://www.nbcchicago.com/blogs/ward-room/Social-Media-and-the-Mayors-Race-298798441.html> [<http://perma.cc/D4AF-RE7J>].

²⁸⁵ *See supra* notes 272–73.

Hampshire has a compelling interest in preventing voter coercion and vote buying by prohibiting the posting of photos of marked ballots on social media.

EPILOGUE

On September 28, 2016, the United States Court of Appeals for the First Circuit decided *Rideout v. Gardner*.²⁸⁶ The First Circuit's opinion addressed the procedural history of the case and the legislative history of RSA 659:35, I before determining that "the statute at issue here is facially unconstitutional even applying only intermediate scrutiny."²⁸⁷ The First Circuit noted that, to survive intermediate scrutiny, a statute needs to be "narrowly tailored to serve a significant governmental interest."²⁸⁸ Although the idea of preventing vote buying and voter coercion is "compelling in the abstract,"²⁸⁹ that sort of interest is not enough for the statute to survive intermediate scrutiny. The First Circuit also found that the statute was not narrowly tailored because the ballot selfie ban impacts all voters, not just those engaged in vote buying schemes.²⁹⁰ Further, the State did not show that other laws prohibiting voter corruption were not sufficient to prevent vote buying and voter coercion.²⁹¹

The First Circuit's decision to apply intermediate, rather than strict, scrutiny to RSA 659:35, I is interesting, because it suggests that the court views the statute as content-neutral and not content-based, even under *Reed v. Town of Gilbert*.²⁹² As this Note suggests, *Reed v. Town of Gilbert* changed the analysis of content-neutral and content-based regulations, expanding the definition of content-neutral regulations.²⁹³ Under this expanded definition, the district court appropriately analyzed the statute using strict scrutiny, because the statute "restricts speech on the basis of its subject matter."²⁹⁴ Because the First Circuit applied intermediate scrutiny, this could be an opportunity, should New Hampshire petition for a writ of certiorari, for the Supreme Court to reevaluate the scrutiny definitions established in *Reed v. Town of Gilbert* and apply any one of the levels of scrutiny discussed in this Note to determine that RSA 659:35, I is, in fact, constitutional.

²⁸⁶ *Rideout v. Gardner*, No. 15-2021, 2016 U.S. App. LEXIS 17622 (1st Cir. Sept. 28, 2016).

²⁸⁷ *Id.* at *13.

²⁸⁸ *Id.* at *14 (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014)).

²⁸⁹ *Id.* (quoting *Rideout v. Gardner*, 123 F. Supp. 3d 218, 231 (D.N.H. 2015)).

²⁹⁰ *Id.* at *19.

²⁹¹ *Id.* at *18–19.

²⁹² *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

²⁹³ *See supra* notes 83–92 and accompanying text.

²⁹⁴ *Rideout*, 123 F. Supp. 3d at 229.