

No. 15-2021

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IN THE  
**United States Court of Appeals**  
**for the First Circuit**

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LEON H. RIDEOUT, *et al.*,  
Plaintiffs-Appellees,  
v.

WILLIAM M. GARDNER, in his official capacity as Secretary of State of the State of  
New Hampshire,  
Defendant-Appellant.

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On Appeal from the United States District Court  
for the District of New Hampshire  
No. 1:14-cv-00489-PB  
District Judge Paul Barbadoro

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**BRIEF AMICUS CURIAE OF SNAPCHAT, INC. IN SUPPORT OF  
APPELLEES AND AFFIRMANCE**

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Snapchat, Inc. has no parent company and no publicly held company holds more than a ten percent interest in Snapchat.

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**BRIEF AMICUS CURIAE OF SNAPCHAT, INC. IN SUPPORT OF  
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**STATEMENT OF INTEREST OF AMICUS CURIAE**

Snapchat, Inc. respectfully submits this brief as *amicus curiae* in support of  
Plaintiffs and affirmance.<sup>1</sup>

Snapchat is one of the most commonly used camera apps in the world, with  
billions of video views each day. The app empowers users to create and share

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<sup>1</sup> Snapchat certifies that all parties have consented to the filing of this brief. Snapchat likewise certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than Snapchat and its counsel contributed money intended to fund the brief's preparation or submission.

video stories about their lives and to view video content from leading publishers. It also lets users share photos and text-based messages.

Political coverage is a big part of the Snapchat experience. Snapchat’s primary news product is its “Live Stories”—raw videos and pictures submitted by Snapchat users and correspondents, and stitched by Snapchat editors into a collage that tells the story of an event. Live Stories are experiential; they allow a remote viewer to see what the user who uploaded the clip saw, giving the viewer an immersive, you’re-right-there experience. Snapchat has used this medium to cover events ranging from the Super Bowl to the Oscars to breaking-news events like the Paris terror attacks. And in recent months, the Snapchat news and politics team—led by former CNN correspondent and veteran campaign reporter Peter Hamby—has ramped up Live Story news coverage of campaign events like the presidential primary debates. Nick Corasaniti, *Snapchat Bets Big on Quick-Fire Approach to Campaign Coverage*, N.Y. Times, Feb. 12, 2016.<sup>2</sup> Hamby also hosts *Good Luck America*, a Snapchat-produced show accessible exclusively through the app that combines vignettes and interviews from the campaign trail with insider explanations of political strategy and jargon. Steven Perlberg, *Snapchat Debuts Political Campaign Show*, Wall St. J., Jan. 28, 2016.<sup>3</sup> And Snapchat partners with

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<sup>2</sup> Available at <http://goo.gl/fN4OFx>.

<sup>3</sup> Available at <http://goo.gl/a2JC3S>.

leading publishers—including the *Wall Street Journal*, CNN, and BuzzFeed—to bring even more in-depth text and video political coverage to its users.

Snapchat’s Live Stories often go behind the scenes at political events, showing backstage moments and closed-door gatherings from which traditional media are shut out. Most relevant for present purposes, the Live Stories also go into the voting booth itself: Snapchat’s news team has received thousands of photo and video “Snaps” submitted by users from inside voting booths. Snapchat has published some of these Snaps as relevant and important parts of the organization’s political news coverage.

Given Snapchat’s largely user-generated approach to news coverage, the company has a unique concern about laws that purport to block regular people from capturing and sharing content that comments on issues of the day. Such laws impose real restrictions on expression and newsgathering as they have evolved in the 21st century. And New Hampshire’s “ballot selfie” law<sup>4</sup> is no exception.

Plaintiffs ably explain why New Hampshire’s law is a content-based restriction on speech and cannot satisfy either intermediate or strict scrutiny.

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<sup>4</sup> In its strictest sense, a selfie is a photo where the photographer is also a subject. But the term has also been used to describe all smartphone pictures shared online, including those here. *See, e.g.*, Brakkton Booker, *Court Strikes Down New Hampshire’s Ban on Selfies in the Voting Booth*, NPR (Aug. 11, 2015), available at <http://goo.gl/sqe3wi>. We use the term in this more capacious way, referring to any picture that could violate the New Hampshire statute as a “ballot selfie.”

Plaintiffs Br. 18-53. Snapchat agrees, and writes to underscore three points. First, ballot selfies and similar digital information-sharing are important ways that younger voters participate in the political process and make their voices heard. Second, newsgatherers like Snapchat have a First Amendment interest in disseminating user-generated content, including ballot selfies, as part of their political coverage. And third, in light of these interests, the flimsy speculation that the State has offered in support of its ballot-selfie ban cannot survive First Amendment scrutiny. The Court should affirm the District Court's judgment and hold that New Hampshire voters may express their political views on digital media as they wish—including through ballot selfies.

### **SUMMARY OF ARGUMENT**

I. Ballot selfies are the latest in a long historical tradition of voters sharing their civic enthusiasm—and their votes—with their social networks. During the nineteenth century, voting was more than casting a ballot. Election Day was a social occasion, with political parties sponsoring raucous gatherings at the polls. The public spectacle led to high voter turnout, as voters lingering to see and be seen drew in even more neighbors to vote and mingle.

The secret ballot put a stop to parties at the polls, but the practice of advertising one's political pride has continued. Starting with the 1896 election, voters wore their pride in the form of campaign buttons, signaling their support for

candidates and causes. And in recent years, voters have flocked to the “I Voted” sticker to show their civic engagement. Whatever its form, the voter’s message is the same: I’m participating in the civic process, and you should, too.

That message has carried over to the virtual world. Millions of voters announce online that they have voted, and many engage with or share political content with their online networks. Selfies and ballot selfies are part of that. A ballot selfie—like a campaign button—is a way to express support for or against a cause or a candidate. And because it is tangible proof of how a voter has voted, a ballot selfie is a uniquely powerful form of political expression. It proves that the voter’s stated political convictions are not just idle talk. Not only that, but ballot selfies and other digital expressions of civic engagement encourage others to vote—particularly younger voters who have historically low turnout rates. Ballot selfies are thus all at once deeply personal and virtuously public expressions.

And they’re the sort of expressions that the State cannot categorically ban without violating the First Amendment. Political expression, after all, is at the core of the First Amendment. It is nearly impossible for a State to justify a content-based restriction on political speech, as New Hampshire tries to do here. The State relies heavily on *Burson v. Freeman*, 504 U.S. 191 (1992), but *Burson* was about a clash between two core rights: voters’ right to cast a vote free from harassment versus third parties’ right to engage in political speech near a polling place. Here,

by contrast, there are no rights on the other side of the ledger. And given that the State has no evidence that ballot selfies have ever been used to engage in vote buying, it has no justification—much less a compelling justification—to ban this uniquely powerful form of political expression.

II. The State’s ballot-selfie ban also unconstitutionally infringes on the First Amendment-protected right of organizations, including Snapchat, to gather the news. The Supreme Court has long recognized that the First Amendment covers newsgathering, particularly newsgathering related to political issues. Snapchat’s news team has received thousands of photos and videos from inside voting booths, submitted by users hoping to share their enthusiasm about voting or make some other political point. By publishing ballot selfies, the media enhances, rather than subverts, our democratic process: The ballot selfie captures the very essence of that process as it happens—the pulled lever, the filled-in bubble, the punched-out chad—and thus dramatizes the power that one person has to influence our government. But beyond that, ballot selfies help the media perform its watchdog role in elections. Ballot-design problems—whether butterfly ballots, hanging chads, or some electronic glitch with computer screens—have all too frequently disrupted the orderly democratic process. A ballot-selfie ban like the State’s could deprive the public from learning about those problems or validating what might otherwise be dismissed as just unfounded anecdote.

The State contends that these burdens on protected expression and newsgathering are simply the price that must be paid to protect the secret ballot. But this Court's sister circuits have rejected similar arguments in an analogous context: bans on petit juror interviews. The problem, those courts have explained, is that such bans sweep too broadly; they protect jurors from overbearing reporters, but they also prevent willing jurors from sharing their thoughts on their service. The State's ballot-selfie ban suffers from the same problem: It sweeps too far by preventing willing voters from sharing their ballot selfies with ethical newsgatherers. Indeed, if anything, a voter sharing ballot selfies with a digital newsgatherer like Snapchat faces even less pressure than the typical news interviewee. In the typical interview, a voter is confronted by a reporter and may find it hard to say no to a request for a quote. Online, the voter is in control: He or she chooses whether to take the photo and when and whether to share it. As a result, the State's prevention-of-coercion rationale has even less force than in the typical media interview. Its law imposes too great a burden on First Amendment rights, including those of newsgatherers like Snapchat.

## ARGUMENT

### **I. BALLOT SELFIES ARE THE LATEST WAY THAT VOTERS, ESPECIALLY YOUNG VOTERS, ENGAGE WITH THE POLITICAL PROCESS.**

The State dismisses ballot selfies as an aberration—a new phenomenon fueled by digital photography and social media. *See* State Br. 32-33. But elections have always been a social affair. Digital media and ballot selfies are simply the latest way that voters, especially young voters, engage with the political process and show their civic pride. The ballot selfie may be a new method of expression, but it's an expression as old as the Republic itself. The State's clumsy bid to ban it is unconstitutional and should be struck down.

1. Americans have shared their votes with their social networks since the mid-nineteenth century. At that time, Election Day was a social occasion when Americans proudly announced that they had voted and urged others to do the same. Political parties turned out voters by sponsoring social, even raucous, Election Day festivities at the polls. Glenn C. Altschuler & Stuart M. Blumin, *Rude Republic: Americans and Their Politics in the Nineteenth Century* 69-79 (2000). The tactic worked; mid-nineteenth century presidential elections saw between 70% and 80% voter turnout. (By contrast, turnout in the 2012 presidential election was only



55%.) John Woolley & Gerhard Peters, The American Presidency Project, *Voter Turnout in Presidential Elections: 1828-2012*.<sup>5</sup>

Voting amounted to a public display of civic engagement. Nineteenth-century voters traveled to the polls not only to vote, but also to meet each other. *Rude Republic, supra*, at 75. Voters lingered at the polls for hours after they had cast their ballots to prove to their neighbors that they had voted. M. Mindy Moretti, ElectionLine, *Stuck on You: Voters Approve of “I Voted” Stickers* (Aug. 11, 2011).<sup>6</sup> And because voters stuck around the polls, it would “create[] the public spectacle that made the polling place exciting,” drawing in even more voters. Richard Franklin Bense, *The American Ballot Box in the Mid-Nineteenth Century*, at x n.8 (2004).

The widespread use of the secret Australian ballot put a stop to partying at the polls, but the social aspect of voting remained: Like they did before, voters shared their enthusiasm for candidates with their social networks. Voters wore the first mass-produced campaign buttons for the election of 1896, a product made possible by the late-nineteenth century invention of celluloid. U.S. House of Representatives, History, Art, & Archives, *The Life and Times of a Campaign*

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<sup>5</sup> Available at <http://goo.gl/NmfJJw>.

<sup>6</sup> Available at <http://goo.gl/IFgix2>.

*Button* (May 16, 2013).<sup>7</sup> The buttons were so popular that the *New York Times* in 1932 wistfully recalled that “[i]n 1896 and 1900 every boy wore a campaign button about the size of a saucer.” Arthur Krock, *The Campaign Gets Under Way*, N.Y. Times, Sept. 18, 1932.

Though campaign buttons still exist, the most popular lapel accessory in recent elections has been the “I Voted” sticker. Sticker manufacturer National Campaign Supply delivered over 50 million stickers in the 2012 election, Padmananda Rama, NPR, *Social Media Likes ‘I Voted’ Stickers* (Nov. 6, 2012),<sup>8</sup> and they have become such an ingrained ritual of Election Day that their absence in some jurisdictions due to budget cuts has sparked voter complaints, *see* Julie Jargon, *Stuck on “I Voted”*, Wall. St. J., Nov. 6, 2012.<sup>9</sup>

2. Ballot selfies—and, more broadly, discussing one’s vote on communications platforms like Snapchat and social-media sites—are the latest iterations of this historical practice. Two-thirds of social-media users use their accounts for political or civic purposes, such as sharing political content and encouraging others to vote. Pew Research Center, *Politics Fact Sheet: Political*

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<sup>7</sup> Available at <http://goo.gl/Jw0iLU>.

<sup>8</sup> Available at <http://goo.gl/NFkcoF>.

<sup>9</sup> Available at <http://goo.gl/WJ8Erf>.

*and Civic Engagement on Social Networking Sites* (Nov. 14, 2012).<sup>10</sup> 22% have let others on a social networking site know how they voted, 30% have been encouraged to vote for a candidate by friends or family on a social networking site, and 20% have encouraged others to vote by posting on a social media site. Lee Raine, Pew Research Center, *Social Media & Voting* (Nov. 6, 2012).<sup>11</sup> And 35% of social-media users find that following politicians on social media makes them feel more personally connected to the politician. Monica Anderson, Pew Research Center, *More Americans Are Using Social Media to Connect With Politicians* (May 19, 2015).<sup>12</sup> In the virtual world, just like the real world, voters share their political enthusiasm with others and engage with the political process.

Selfies are part of that enthusiasm and engagement. The 2016 election cycle has been called the “Selfie Election,” as voters clamor for pictures with their preferred candidates. Jeremy W. Peters & Ashley Parker, *Facing a Selfie Election, Presidential Hopefuls Grin and Bear It*, N.Y. Times, July 4, 2015.<sup>13</sup> The selfie is an “authentic memento” for the voter. *Id.* And a candidate selfie shared online “helps extend the chatter around a rally beyond those who attended.” *Id.*

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<sup>10</sup> Available at <http://goo.gl/ydOHXy>.

<sup>11</sup> Available at <http://goo.gl/PSmm3r>.

<sup>12</sup> Available at <http://goo.gl/OPKQ0K>.

<sup>13</sup> Available at <http://goo.gl/ZMH3qU>.

Ballot selfies are used in much the same way. As Plaintiffs’ photos show, voters use ballot selfies to encourage others to vote, J.A. 116, and to rail against the seeming sameness of political candidates, J.A. 117-118. These sorts of messages are core political speech. And ballot selfies convey voters’ messages in a way that no other form of communication can. It is one thing to say you support Jane Smith for Congress; it is quite another to show—definitively—that you have supported her by taking a photo of your ballot. *See* J.A. 116. It is one thing to say that the field of candidates is so bad that you’d vote for your dog; it is quite another to show that you wrote in your dog to be New Hampshire’s next U.S. Senator. *See* J.A. 117. It is precisely *because* a ballot selfie proves how a voter has exercised her franchise that it is an unmatched expression of civic engagement. There is, simply put, no substitute for this speech.

Voters’ political participation online can bring significant public benefits. Casting a vote is a “social norm, considered beneficial for the whole community.” Betsy Sinclair, *The Social Citizen: Peer Networks and Political Behavior* 21-22 (2012). A voter displaying an “I Voted” sticker or posting a ballot selfie signals compliance with the norm, and exerts social pressure on others to do the same. *See id.* at 40-41. In more concrete terms, ballot selfies have the potential to increase turnout. One study found, for example, that online networks’ “I Voted” buttons drove an additional 340,000 voters to the polls in the 2010 congressional elections.

Zoe Corbyn, Nature, *Facebook Experiment Boosts US Voter Turnout* (Sept. 12, 2012). The effect is likely to be greatest on younger voters, who historically have the lowest rates of voter turnout but highest rates of online engagement. See Catherine Rampell, *Where Are All The Young Voters?*, Wash. Post, Jul. 23, 2015.<sup>14</sup>

3. Given this history and these benefits, the State’s ballot-selfie ban wilts under the First Amendment’s exacting scrutiny. “[S]peech concerning public affairs,” after all, “is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Political speech is “at the core of our electoral process and of the First Amendment freedoms” and is “an area of public policy where protection of robust discussion is at its zenith.” *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (citations omitted). Because political speech is at the core of the First Amendment, “legislative restrictions on advocacy of the election or defeat of political candidates”—the sort conveyed by a typical ballot selfie—“are wholly at odds with the guarantees of the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 50 (1976) (per curiam). And “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000).

Attempting to make its ballot-selfie ban one of the rare survivors of this stringent standard, the State relies heavily on the Supreme Court’s plurality

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<sup>14</sup> Available at <https://goo.gl/50pcj0>.

opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), and its ilk. State Br. 27-32. But *Burson* and similar buffer-areas-at-the-polls cases are about an altogether different problem. Buffer-zone cases present a conflict between two fundamental rights: the right to speak freely on political issues on the one hand and the right to cast a vote free from harassment on the other. *See Burson*, 504 U.S. at 211 (plurality opinion). After weighing those two rights in light of America’s history of intimidation at the polls, the *Burson* Court concluded that the buffer-zone law at issue satisfied strict scrutiny. *Id.* at 199-211. The need to protect voters justified restricting the speech of non-voters. *See id.*

Not so here; there is no conflict between two fundamental rights in this case. Ballot selfies pose no danger to other voters, carry no implicit or actual threat, and do not threaten the orderly functioning of a polling place. They are instead a positive personal expression made in the privacy of a voting booth—silent, unassuming, peaceful. And yet, when posted online, or when news organizations publish them, their message can be thunderously loud, powerful, transformative. *See* Giri Nathan, Deadspin, *Voting Booth Selfies Aren’t Legal Everywhere, But They Should Be* (Apr. 19, 2016) (ballot selfies are “an act of political expression”).<sup>15</sup> The drama of all that expression takes place well clear of the

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<sup>15</sup> Available at <http://goo.gl/EPZnkU>.

polling place. It plays out in people's homes, schools, offices, restaurants—wherever people happen to be with a smartphone, which is pretty much anywhere.

And that gets to the real problem. The danger that lurks with a ballot-selfie ban like the State's is that the State is less interested in regulating peace at the polling place and more interested in regulating the effect that such a powerful and novel form of political expression may have. Here, the State's unproven assumption that a ballot selfie will wreak havoc on polling places cannot survive First Amendment scrutiny.

So the State must point to something else to clear the high bar of strict scrutiny. It cannot. Although the State conjures up concerns about vote-buying, it cannot cite any case—anywhere—where ballot selfies have been used as part of a vote-buying scheme. State Br. 30. If anything, the evidence points the other way. Utah, Oregon, and Arizona have all passed laws expressly *allowing* ballot selfies. *See* Plaintiffs Br. 31. Yet vote buying has not flourished in those States. The First Amendment demands more than imagined ills before suppressing free speech.

To be clear: The State may, of course, ban vote buying. It may punish those who take ballot selfies to further a vote-buying scheme. And it may use such ballot selfies in a prosecution. But the one thing the State cannot do is rely on speculative fears to justify a ban on core political speech *absent* evidence of vote buying. A State's burden is not met where it “offers *no* evidence or anecdotes in

support of its restriction.” *El Dia, Inc. v. Puerto Rico Dep’t of Consumer Affairs*, 413 F.3d 110, 116 (1st Cir. 2005) (brackets and citation omitted). New Hampshire’s “net is [therefore] cast too broadly for such a small catch.” *Id.* at 117.

## **II. NEWSGATHERERS, INCLUDING DIGITAL NEWSGATHERERS SUCH AS SNAPCHAT, HAVE A FIRST-AMENDMENT INTEREST IN SHARING VOTERS’ BALLOT SELFIES.**

Plaintiffs have focused, and properly so, on voters’ First Amendment right to express their civic pride through ballot selfies. But there is another compelling interest on the same side of the ledger: Newsgatherers like Snapchat have an independent First Amendment interest in sharing voters’ ballot selfies, and other user-generated political content, with the public. The State’s ballot-selfie ban unjustifiably infringes on that right.

1. Newsgathering “qualif[ies] for First Amendment protection.” *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). That is because “ ‘without some protection for seeking out the news, freedom of the press could be eviscerated.’ ” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (opinion of Burger, C.J.) (citation omitted). Those protections apply with particular force to political newsgathering. There is, after all, “practically universal agreement that a major purpose” of the First Amendment “was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). And the Constitution “specifically selected the press . . . to play an important role in the



discussion of public affairs.” *Id.* at 219. The press “serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.” *Id.*

Both of these First Amendment functions—discussing public affairs and acting as a government watchdog—are advanced by preserving the media’s ability to publish ballot selfies. Media coverage of Election Day “focuses social and political activity” and “can exert a mobilizing impact on a wider group of potential voters,” getting them out to the polls. Rich Morin, Pew Research Center, *Study: Early Voting Associated With Lower Turnout* (Sept. 23, 2013).<sup>16</sup> By sharing the outpouring of civic pride that comes with Election Day, including ballot selfies, the media encourages others to participate. And by exercising its First Amendment right to publish ballot selfies, the media becomes a “ ‘surrogate[] for the public’ ” in monitoring and promoting elections and the electoral process. *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) (citation omitted).

Publishing ballot selfies can also unleash the press’s watchdog function. Consider the disastrous “butterfly ballot” from Palm Beach, Florida, in the contested 2000 election, where voters were asked to punch holes in a strip of paper with candidates’ names on either side. *See* Frank Cerabino, *Ten Years Later*,

*Infamous 2000 Election Ballot Recount Still Defines Palm Beach County to Many*, Palm Beach Post, Nov. 9, 2010.<sup>17</sup> That flawed design likely led to many voters inadvertently voting for Pat Buchanan, a third-party candidate, instead of Al Gore, the Democratic candidate. *Id.* At least one study even claims that the butterfly ballot was responsible for George W. Bush’s margin of victory in Florida—and thus his presidency. See Jonathan N. Wand, *et al.*, *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 Am. Political Sci. Rev. 793, 793 (2001).<sup>18</sup>

A decade later, ballot-design problems persist. Ballots tend to be designed at a “hyperlocal” level, and therefore are rarely reviewed by professional designers. See Sam Greenspan, *99% Invisible*, *Butterfly Effects* (Nov. 1, 2015).<sup>19</sup> Bad ballot design can lead to the loss of tens of thousands—even hundreds of thousands—of votes every cycle. Lawrence Norden, *et al.*, Brennan Center for Justice, *Better Ballots* 9 (2008).<sup>20</sup> If voters cannot share ballot selfies with the media, the next butterfly ballot may go undetected—or at least not publicized in a way that draws real attention to its flaws and impels changes. Effectively forbidding the media

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<sup>16</sup> Available at <http://goo.gl/J7VNr6>.

<sup>17</sup> Available at <http://goo.gl/5Z7CEw>.

<sup>18</sup> Available at <http://goo.gl/wE3xx7>.

<sup>19</sup> Available at <http://goo.gl/6LmlxD>.

from receiving tangible reports of such democratic misfires infringes on a core purpose of the First Amendment. *Cf. Nolan v. Fitzpatrick*, 451 F.2d 545, 547-548 (1st Cir. 1971) (holding that prisoners had a First Amendment right to write letters to the press regarding prison conditions because “the condition of our prisons is an important matter of public policy”).

2. The First Amendment rights granted to the press extend equally to digital newsgatherers like Snapchat. The Framers, after all, guaranteed freedom of the press to all press, not just “newspapers, books, and magazines.” *Mills*, 384 U.S. at 291. And extending press protections to digital media companies like Snapchat is critically important because voters, particularly younger voters, increasingly receive news from online sources.

Contrary to popular perception, Millennials—those 18 to 34—are not apathetic about news. 85% of Millennials say that keeping up with the news is at least somewhat important to them, 69% get news daily, and 45% regularly follow five or more “hard news” topics like national politics. American Press Institute, *How Millennials Get News: Inside the Habits of America’s First Digital Generation* (Mar. 16, 2015).<sup>21</sup> And Millennials, unlike older generations, increasingly consume news from digital media sources. Studies have shown, for

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<sup>20</sup> Available at <http://goo.gl/NhKerG>.

<sup>21</sup> Available at <https://goo.gl/Io5fXF>.

instance, that the majority of Millennials get political news from digital and social media and elsewhere online, while comparatively few get political news from local television—the exact opposite of the way older generations obtain political news. Pew Research Center, *Millennials & Political News: Social Media—the Local TV for the Next Generation?* 2 (June 1, 2015).<sup>22</sup>

Digital media sources like Snapchat and social-media sites are particularly important outlets for those most engaged in the political process: the so-called very-likely voters. Among Millennials, 74% of Democratic and 50% of Republican very-likely voters use social media to learn about the 2016 presidential election. Among all very-likely primary voters, 46% use social media for this purpose. Jeffrey Gottfried & Michael Barthel, Pew Research Center, *Among Millennials Engaged in Primaries, Dems More Likely to Learn About the Election from Social Media* (Feb. 9, 2016).<sup>23</sup> As for Snapchat itself, studies show that Millennial very-likely voters regularly consume political news through the platform. *Id.* In fact, twice as many 18-to-24-year-olds watched Snapchat’s Live Story coverage of the first Republican primary debate as watched it on live television. Mike Allen & Daniel Lippman, Politico, *Snapchat Debate Stat* (Aug.

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<sup>22</sup> Available at <http://goo.gl/ip84kA>.

<sup>23</sup> Available at <http://goo.gl/k12bA9>.

14, 2015).<sup>24</sup> And every major candidate running for president in this cycle is using Snapchat to reach young voters.

As Millennials increasingly receive political news from digital media news sources like Snapchat, these organizations have increasingly invested in newsgathering. To take examples beyond Snapchat's own growing news operation, BuzzFeed, once a viral content aggregator, now boasts a news team with reporters on the campaign trail, in the White House briefing room, and around the world. *See* Sridhar Pappu, *Millennial Reporters Grab the Campaign-Trail Spotlight*, N.Y. Times, Mar. 5, 2016<sup>25</sup>; Gregory Korte, USA Today, *Here's the New White House Briefing Room Seating Chart* (Mar. 25, 2015).<sup>26</sup> The same is true for viral news site IJ Review, which was founded just four years ago and now has a full-time reporter in the White House briefing room. *See* Juana Summers, Mashable, *First: Machine-Gun Bacon. Then: The World* (Aug. 19, 2015)<sup>27</sup>; *see also* Kate Bennett, Independent Journal Review, *Everything I Learned My First Week As a White House Reporter* (Dec. 2015).<sup>28</sup> Other digital upstarts like Business Insider and Mic have made serious forays into covering American

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<sup>24</sup> Available at <http://goo.gl/FsybE6>.

<sup>25</sup> Available at <http://goo.gl/c32zzc>.

<sup>26</sup> Available at <https://goo.gl/Pp9Zgo>.

<sup>27</sup> Available at <http://goo.gl/jU7PIId>.

politics. See Alyson Shontell, Business Insider, *How Two Millennials Built a \$100 Million Startup in 4 Years and Landed an Interview With the President* (Aug. 29, 2015)<sup>29</sup>; Joe Pompeo, Politico, *Henry Blodget's Big Plans for Business Insider* (Nov. 2, 2015).<sup>30</sup>

At Snapchat, Hamby heads up newsgathering and has been given the resources to dive into coverage of the 2016 election and to build out local and international news coverage. In addition to Hamby, Snapchat has hired Katy Byron, a former CNBC and CNN producer and two-time Peabody Award winner, as Managing Editor. Their team includes six journalists hailing from traditional broadcast networks, cable news teams, and colleges—and those numbers continue to grow rapidly. See *Snapchat Bets Big, supra*.

The news team at Snapchat produces Live Stories viewed by 5 to 20 million global viewers at a time. They have covered elections in the U.K., Argentina, Myanmar, Peru, and the Philippines. They have covered severe weather events, like the historic 2015 flooding of South Carolina. They have led coverage of breaking news like the terrorist shooting in San Bernardino and NASA Astronaut

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<sup>28</sup> Available at <http://goo.gl/gFWCeQ>.

<sup>29</sup> Available at <http://goo.gl/YSb0eo>.

<sup>30</sup> Available at <http://goo.gl/wQJdEC>.

Scott Kelly's return to Earth after a year on the International Space Station. And they have examined issues like the Iran Nuclear Deal and the Flint Water Crisis.

As for the 2016 race: Snapchat has covered every major presidential debate as credentialed press. And Snapchat has been granted credentials to cover, as a news organization, both the Republican and Democratic National Conventions, alongside traditional media outlets like the *New York Times*, *Wall Street Journal*, and others. More telling still, newsmakers themselves take Snapchat seriously; Hamby has interviewed Vice President Joe Biden, House Speaker Paul Ryan, and Senator Lindsey Graham for *Good Luck America*, as well as presidential candidates Bernie Sanders, Jeb Bush, and Chris Christie.

3. Snapchat's political reporters do what all political reporters do: interview candidates, talk to voters, and report what they learn to their viewers. *Snapchat Bets Big, supra*. Snapchat stands out, however, due to its user-generated content. User-generated content on Snapchat is Snapchatters sharing their experiences with fellow Snapchatters, with professional editors curating the best submissions to create Snapchat's Live Stories. *See id.* The benefits for Snapchat's political reporting are obvious. Snapchat's users all have video cameras on their phones, and that makes each user a potential correspondent contributing from the field to

Snapchat's political coverage. See Jefferson Graham, *How To Be A Citizen Journalist With Your Smartphone*, USA Today, May 11, 2015.<sup>31</sup>

Indeed, Snapchat users may in some instances be better positioned than Snapchat's hired professionals. Ordinary users sometimes have a perspective that traditional reporters do not: backstage, behind closed doors, or—in the case of ballot selfies—in voting booths. Snapchat's Live Story on the Iowa caucuses in February, for instance, included Snaps from inside the state's caucus precincts, giving viewers a unique experience and access to an arcane process that is often bewildering to most Americans. This access was unprecedented: It would be impossible for television cameras to cover every one of Iowa's 1,681 precincts over the course of a few hours. Snapchat received content from nearly all of them, and used a number of compelling vignettes from those caucuses in its Live Story. In one dramatic video, Snapchat captured a Snap of a tie-breaking coin-toss at an Iowa precinct, which determined that Bernie Sanders won that precinct over Hillary Clinton. It was widely reported in traditional press that Hillary Clinton had won all coin-tosses that night. See, e.g., Philip Bump, *Here's Just How Unlikely Hillary Clinton's 6-for-6 Coin-Toss Victories Would Have Been*, Wash. Post, Feb.

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<sup>31</sup> Available at <http://goo.gl/4YEb1F>.



2, 2016.<sup>32</sup> Snapchat’s news team had video evidence to the contrary, and used it to inform the public.

Moreover, Snapchat’s news team can attest that the selfies at issue in this case are no anomaly—and the harm that can be caused by New Hampshire’s overbroad law is not merely theoretical. 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. Nearly every primary voting Live Story produced by Snapchat’s news team has included Snaps from inside voting booths. Snapchat also has received thousands of Snaps of election officials counting votes after ballots have been cast. And Snapchat has received Snaps from inside voting booths and of ballot counting during international elections including in Peru, Argentina and Myanmar.

This kind of user-generated content is particularly compelling to younger viewers. Millennials find user-generated content 50% more trustworthy and 35% more memorable than other content. Laura Spica, *Consumers Prefer Content They Create*, Knoxville (Tenn.) News-Sentinel, Dec. 6, 2015. And news organizations’ use of user-generated content is not unique to Snapchat. User-generated content “is used across the 24-hour news industry on a daily basis.” Claire Wardle, *et al.*, Columbia Journalism School, *Amateur Footage: A Global Study of User-*

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<sup>32</sup> Available at <https://goo.gl/FUTp7O>.

*Generated Content in TV and Online-News Output* 11 (Apr. 2014).<sup>33</sup> Publishing user-generated content like ballot selfies is an integral part of newsgatherers' First Amendment-protected political reporting.

4. The State will no doubt argue that the burden on newsgatherers from its ballot-selfie ban is simply the price of ensuring that voters are not harassed or intimidated into revealing their vote. *See* State Br. 27-33. This Court's sister circuits, however, have rejected similar arguments in striking down trial courts' bans on petit juror interviews. In those cases, the trial courts justified their blanket bans by reasoning that jurors should not be coerced into sharing secret jury-room deliberations. *See In re Express-News Corp.*, 695 F.2d 807, 810-811 (5th Cir. 1982); *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978). The problem is that the bans were not tailored; they "appl[ied] equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications." *Express-News*, 695 F.2d at 810; *see also Sherman*, 581 F.2d at 1361. The trial courts could protect jurors that do not wish to speak about their service from importuning reporters. *Express-News*, 695 F.2d at 809-811; *Sherman*, 581 F.2d at 1362. But they could "not impose a restraint that sweeps so broadly and then require those who would speak freely to justify special

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<sup>33</sup> Available at <http://goo.gl/reZDj1>.

treatment by carrying the burden of showing good cause. The first amendment right to gather news is ‘good cause’ enough.” *Express-News*, 695 F.2d at 810.

The same is true here. The State may protect voters who wish to keep their ballot private from overbearing reporters. And if a voter were coerced, the photo is evidence that can be used in a prosecution. But the State may not impose an absolute ban that prevents even voters who *want* to share their ballot selfies with digital media newsgatherers from doing so. If anything, a voter sharing ballot selfies with a digital newsgatherer like Snapchat faces even less pressure than the typical interviewee. In the typical interview, a voter is confronted by a pen-and-pad-toting reporter and may find it hard to say no to a request for a quote. Online, by contrast, the voter is in control. The voter chooses to take a ballot selfie and chooses when and whether to share it with the digital newsgatherer. The process is entirely self-directed. As a result, the State’s prevention-of-coercion rationale has even less force than in the typical media interview. For that reason, too, the Court should hold the State’s ballot-selfie ban unconstitutional.

## CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

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April 22, 2016

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and contains 5,887 words.

/s/ Neal Kumar Katyal  
Neal Kumar Katyal

## **CERTIFICATE OF SERVICE**

I certify that on April 22, 2016, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Neal Kumar Katyal  
Neal Kumar Katyal