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ACLU seeks TRO to allow 'ballot selfies' on Election Day

By Phil Johnson

Likes, celebrity and the perfect caption. When it comes to "ballot selfies," is posting a picture of a completed ballot self-evidently protected speech, or a threat to democracy?

The American Civil Liberties Union will argue the former Wednesday in the Northern District before U.S. District Judge William Alsup.

In a lawsuit filed Monday, the ACLU alleges that two laws disallowing pictures of filled-out ballots chill free speech. *ACLU et al. v. Padilla*, 16-CV06287 (N.D. Cal., filed Oct. 31, 2016).

The state Legislature recently repealed the laws, but they will remain on the books during Election Day.

Several states have confronted similar questions this election cycle, with most courts finding in favor of the free speech argument. The ACLU suit addresses similar questions with important caveats.

California Elections Code sections 14276 and 14291 prohibit voters from showing anyone who and what an individual voted for on a marked ballot. Such laws have risen to relative prominence recently in the wake of a social media trend in which people snap photos of themselves in the ballot booth with their completed ballot.That fact, combined with a memo recently sent by Secretary of State Alex Padilla's office advising election officials that the laws remain in effect, prompted the ACLU to seek a temporary restraining order and a preliminary injunction to allow voters to snap and post ballot photos.

"We do not want voters to ignore the directions of elections officials at voting places. And we rely upon individuals to obey the law — especially voting laws — even when they may be able to violate it without being caught and punished," wrote ACLU staff attorney Michael T. Risher.

Padilla's office says he supports the repeal of the election codes, but warned the court in a response to the complaint against "last-minute lawsuits to undermine the systematic preparations of the state's county election officials."

Richard L. Hasen, a professor at the UC Irvine School of Law who writes a blog on election law and is not involved in the case, said ballot selfies could be a threat to democracy, arguing that they could open the door to potential vote-buying.

"The concern is that if people can prove how they voted, they are more likely to sell their votes in a transaction that can be verified," Hasen said. "I think states should be able to ban photography of voted ballots."

He said there are examples of "absentee ballots being the subject of coercion or vote buying."

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